89-1774

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HENRY F. K. KERSTING,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does compliance with an I.R.S. John Doe summons, either complete or substantial, compelled by a court order of contempt, moot an appeal by the person summoned, as to the enforceability of the John Doe summons and the subsequent use by the Internal Revenue Service of documents obtained thereby.

(2) What quantum of evidence meets or passes the threshold at which the court must afford the person summoned a limited evidentiary hearing as to I.R.S. good faith in issuing a John Doe Summons?

(3) Should the District Court have afforded Petitioner an evidentiary hearing on his objections to enforcement of the John Doe summons herein?

(4) Assuming it is otherwise properly issued, what enforcement should be given to a John Doe summons once it is shown that a large part of the records sought and the identity of hundreds of persons whose records are sought by the summons, were in the possession of the Internal Revenue Service or were readily available to it from other sources before the issuance of the John Doe summons?

(5) May a court properly impose upon the person summoned under a John Doe summons, the burden of proving who among the persons whose records were summoned remain under criminal referral or investigation, when the person summoned competently raises the pendency of a criminal referral and/or investigation of those persons whose records are summoned by the John Doe summons?

(6) Whether a court may ignore the presumption of the continuance of the criminal referral, in the context of

a show cause hearing on the issuance of a John Doe summons, when faced with objections to enforcement of the John Doe summons based upon the pendency of a criminal referral and/or investigation of those persons whose records are summoned?

(7) Is it evidence of the bad faith of the I.R.S. in obtaining the issuance of a John Doe summons when it conceals the existence of an on-going criminal referral/investigation?

(8) Was the issuance of the John Doe summons in this case in "good faith pursuit" of the purposes authorized by Congress when the identities of over 600 investors whose records were summoned were known to the Internal Revenue Service before issuance of the John Doe summons?

(9) Are the Internal Revenue Service's pleadings and judicial admissions evidence of its bad faith in obtaining issuance of a John Doe summons which may be used by the taxpayer to show the bad faith on the government's part in obtaining a John Doe summons?

(10) Are the Treasury Regulations which prescribes the reimbursement of costs in compliance with John Doe summons constitutional, either on their face or as applied in this case?

(11) Whether the Trial Court should have reopened the record for fraud perpetrated upon the Court by the I.R.S. and its counsel in seeking the John Doe summons or for newly discovered evidence reflecting upon the bad faith of the I.R.S.?

(12) Is it bad faith, *per se*, for the I.R.S. to use a John Doe summons to seek the records of 600+ taxpayers, whose identities are known to it, when those taxpayers are available for audit or other discovery?

PARTIES

Petitioner-Appellant in this case is Henry F. K. Kersting.

Respondents-Appellees in this case are the Internal Revenue Service and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioner, Henry F. K. Kersting (hereinafter "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which sustained an order of the United States District Court for the District of Hawaii denying Petitioner's objections to a John Doe summons served upon him by the Internal Revenue Service (hereinafter "I.R.S.").

REPORTS OF OPINIONS

The opinion of the Ninth Circuit Court of Appeals in this case is reported at 891 F.2d 1407 and is set forth in Appendix B.

The order of the United States District Court for the District of Hawaii was not a reported opinion and is set forth in Appendix I.

JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Ninth Circuit on December 13, 1989, and is set forth at Appendix B. An order denying a rehearing with rejection of suggestion for rehearing en banc was entered by the Court of Appeals on February 16, 1990. That order is set forth in Appendix A.

The jurisdiction of this Court in invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

26 U.S.C. (Internal Revenue Code of 1954, as amended) Sections 7602, 7604, 7609 and 7610; Treasury Regulation § 301.7610-1 (26 C.F.R.); and Rules 11, 59b and 60b, F. R. Civ. P. These are set forth in Appendices N and P-V.

The following Constitutional provision is involved in this case: Fifth Amendment of the United States Constitution. This is set forth in Appendix O.

STATEMENT OF THE CASE

This case involves pervasive administrative bad faith on the part of the I.R.S., which culminated in the issuance of a John Doe summons to Petitioner, Henry F. K. Kersting, when the I.R.S. was aware of the identity of hundreds of persons whose records were summoned by the John Doe summons, including those of Applicants in Intervention, and was in possession of many of the documents summoned and followed use of civil summons during the pendency of grand jury investigations.

Petitioner was the alleged promoter of a tax favored investment plan. Under the plan investors in various corporations were able to receive tax benefits. Applicants in Intervention are or were investors in these corporations and claimed deductions arising out of these investments. Applicants in Intervention are Petitioners in the test case pending in United States Tax Court wherein the legality of the deductions claimed is in issue. (*Dixon et al v. Commissioner*, Docket No. 9382-83) Their appeal is the subject of Docket No. 88-15565, consolidated with the instant appeal. Appendix C.

In December of 1980, the I.R.S. initiated an investigation of these investment plans. In January of 1981, the I.R.S. obtained a criminal search warrant for documents in Petitioner's offices for the purpose of furthering their, until that time, civil investigation. According to I.R.S. internal memos, the I.R.S. wished to avoid the running of the three year statute of limitations imminent at April 15, 1981. The I.R.S. chose to subvert the notice requirements and opportunity to contest inherent in a civil summons proceeding by the use of a criminal subpoena for civil purposes, since they were afraid that a civil summons

would be contested by Petitioner, possibly allowing the statute of limitations to run.

On January 22, 1981, the search warrant was served on Petitioner's offices and the I.R.S. obtained all records generated regarding the investment plan up until that date. The I.R.S. removed some 750,000+ separate documents, comprising 96 boxes, from Kersting's offices on that date and copied all of same, disseminating the copies throughout the I.R.S.

Although ordered by the Ninth Circuit, in prior, separate proceedings, to return the documents to Petitioner, the I.R.S. retained copies of all documents which they had seized on January 22, 1981. Thus the I.R.S. has in its possession all documents as well as the identities of all investors in the so-called Kersting companies as of January 22, 1981. This has been judicially admitted by the I.R.S. at the hearing on the enforcement of the John Doe summons at issue before the Court today, at oral argument before the Ninth Circuit and in the briefs and other responses filed in the Ninth Circuit.

Sometime in the latter part of 1982, the I.R.S. sent notices to Petitioner and at least thirty-six other investors in the corporations that criminal indictments were being considered on each of them individually for their participation in the so-called Kersting companies. Although at least two separate grand juries looked into the circumstances surrounding the so-called Kersting companies, no indictments have yet issued. Only Petitioner received notice from the Department of Justice that they were declining prosecution against him. To Petitioner's knowledge, no one else who was the subject of the criminal referral has received notice that the Department of Justice was declining to prosecute them, and the I.R.S. has pro-

duced no evidence to show that the criminal referral as to those persons has been terminated.

On May 15, 1987, the I.R.S. petitioned the District Court for the District of Hawaii for leave to serve a John Doe summons on Petitioner. In its Petition for Leave to Serve a John Doe Summons, Memorandum of Points and Authorities in Support of Petition for Leave to Serve a John Doe Summons and Declaration of Larry Tahara in Support of Petition for Leave to Serve John Doe Summons (Appendix K), the I.R.S. alleged that Petitioner promoted tax shelters of questionable validity and that it sought the summoned documents in order to *identify* taxpayers participating in his investment program. Time and again therein, the I.R.S. admitted that it knew the identity of those taxpayers who were involved in 1,300 pending United States Tax Court cases involving "tax shelter plans promoted by Henry Kersting." (See Appendix K, Page 44a, paragraph 8, Page 51a and Page 56a, paragraph 6.)

It is important for this Court to note that the I.R.S. concealed its prior illegal use of summons during the pendency of the grand jury proceedings when it filed its "good faith" affidavit herein as well as the identities of the investors which were known to it as well as the number of documents which it already had in its possession.

The I.R.S. issued the John Doe summons requiring Petitioner to produce all documents for the years 1984 through 1986, which relate to the investment plan promoted by Petitioner, but by their attachments, the I.R.S. expanded the summons to include documents for the years 1981 through 1986, even though the I.R.S. purportedly sought to investigate tax years 1984, 1985, and 1986,

and even though by the I.R.S.'s own admission (See Appendix K, Page 44a, paragraph 8, Page 51a and Page 56a, paragraph 6), it already knew the identities of all investors as of January 22, 1981, at least six hundred of whom are presently and were in August of 1987, in United States Tax Court on matters directly relating to the Kersting-promoted investment plan, with over 1300 cases then pending.

At the August 24, 1987, show cause hearing on the enforcement of the John Doe summons, Petitioner brought objections to the enforcement of the John Doe summons, particularly with respect to records of individual investors whose names were in fact known to the I.R.S., and whose records were already obtained by the I.R.S. under the 1981 search warrant. Petitioner also objected to the enforcement of the summons on the ground that it was not served pursuant to a legitimate purpose and was issued in bad faith, as a substantial number of the documents summoned pertained to persons who have been and presumably still are the targets of ongoing criminal investigation/referral by the I.R.S., and still others pertained to persons whose identities were already known to the I.R.S. or were readily available from alternative sources (e.g. the I.R.S.'s own files on "Kersting" cases in United States Tax Court). Petitioner further asserted that the I.R.S. issuance of the John Doe summons as to persons whose identity was already known was done to subvert the notice requirements under I.R.C. Sec. 7609(a).

Although the I.R.S. made an oral assertion at the hearing of August 24, 1987, that Petitioner was no longer the target of a criminal investigation, it presented no competent evidence to rebut Petitioner's affidavit as to

the notices of criminal referral of both Kersting and at least thirty-six other investors or to rebut the presumption that criminal referrals still exist as to investors in the "Kersting companies." And, although he requested same, Petitioner was denied an evidentiary hearing, much less the opportunity to present evidence, for the district court limited the proceedings to the pleadings on file and the argument of counsel.

On January 14, 1988, the District Court denied Petitioner's objections to the enforcement of the John Doe summons. As to Petitioner's objection that a number of names of persons who participated in Kersting's plan are known, and that a review of cases before the Tax Court would reveal such names, the Court stated:

> "However, although it is theoretically possible for the Government to obtain some of the names of persons who participated in Kersting's programs, a review of cases before the Tax Court will not reveal the names of *all* such persons." [Emphasis added] (See Appendix I at p. 37a).

The Court went on to state, as to Petitioner's objection that some of the persons included in the information sought have been referred to the Department of Justice for criminal prosecution, that—

> "[I]f Kersting is able to show that there has been a referral, information regarding that person or persons need not be provided." (See Appendix I, at p. 38a).[1]

1. On February 5, 1988, Kersting filed a motion in District Court to stay the execution of the summons pending appeal. That stay was denied on March 17, 1988. Kersting also requested a stay from the Ninth Circuit, which was denied on April 13, 1988. Appendices H and F.

At a May 31, 1988, hearing, the judge orally held Kersting in contempt, and ordered him to produce the documents specified in the summons, imposing upon Petitioner a $1,000 per day fine for so long as Petitioner did not fully comply with the summons and produce all documents requested thereby.[2] This order of contempt has never been reduced to writing but was pronounced on the record. At about this time, being concerned that their records were about to be turned over to the I.R.S., Applicants in Intervention sought leave to intervene in the District Court to protect their interests and to receive proper notice of the summons proceedings. Leave to intervene was denied. Appendix E.

In complying with the summons and the order of contempt of May 31, 1988, Petitioner discovered that in 1982, when the I.R.S. had been serving him with summonses for the production of documents, the I.R.S., through its Special Agents who were also "Special Agents" of the Grand Jury, had also served grand jury subpoenas to his banks for the same documents. Petitioner brought a motion under Rule 60b, F. R. Civ. P., to reopen based upon this newly discovered evidence or fraud of the I.R.S. This motion was denied by the district court. Appendix E.

On August 5, 1988, Petitioner filed a motion in District Court for discharge from prior orders of that court,

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2. Kersting filed additional motions in May 1988 requesting discovery and costs. On August 31, 1988 the district court denied these additional motions along with a motion filed by Applicants in Intervention who sought to intervene and who asserted that the I.R.S. sought information about them with the summons notwithstanding that the I.R.S. already knew their identities. The district court held that its jurisdiction was limited to the enforcement of the summons, and that because the summons had been enforced, 26 U.S.C. 7604 no longer conferred jurisdiction. Case No. 88-15549 is Kersting's appeal of those portions of the August 31 order that pertain to him.

asserting full compliance. The Government filed opposition papers on September 26, 1988, claiming that Petitioner had not fully complied with the summons. On October 4, 1988, the District Court denied Petitioner's August 5th motion, refusing to address its merits for lack of jurisdiction while an appeal was pending before the Ninth Circuit.[3] Appendix D.

On appeal to the Court of Appeals for the Ninth Circuit, the appeals court determined that the evidence before it was not adequate to determine whether Kersting had fully complied with the summons and remanded to the District Court on that issue. The Ninth Circuit, recognizing a split in the Circuits on the issue of whether full compliance to a summons moots an appeal as to its enforceability, held that such compliance does in fact moot appeal. In support of this determination the court stated—

> ". . . even if Kersting's appeal is found to be moot, he may still challenge the legality of the summons. For example, in the event that the Government institutes civil or criminal proceedings against him, he may move to suppress evidence obtained from the enforcement of the summons at trial."[4] (Appendix B, at p. 11a).

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3. Determining that full compliance moots appeal of summons enforceability, the Ninth Circuit subsequently remanded the issue to the district court for proceedings to determine whether Kersting has substantially complied with the John Doe summons.

4. Petitioner does not agree with this assertion. First, the suppression of evidence in a subsequent trial is not an effective cure of the Government's bad faith in issuing the John Doe summons. The only appropriate remedy is the return of the documents together with the copies made of same by the I.R.S., as well as the suppression of the use of the information by the I.R.S. Second, as to all of the persons whose records have been illegally obtained, no standing will exist to challenge the use of evidence seized from Kersting.

The Ninth Circuit affirmed the District Court's denial of Petitioner's objections as to the enforceability of the John Doe summons, without addressing the question of the identities of taxpayers which were known to the I.R.S. when it sought the issuance of the John Doe summons herein.

Following a request for a rehearing, which was denied, Kersting petitioned this Court for a writ of certiorari to reconcile the conflict between the Courts of Appeals as to whether compliance with a John Doe summons moots appeal and to reconcile issues related to its proper issuance and challengeability.

The statutory basis for federal jurisdiction in the United States District Court is 28 U.S.C. Sec. 1331 and 26 U.S.C. Sec. 7609.

ARGUMENT

Reasons for granting the Writ.

This case is ripe for Supreme Court review to resolve a sharp split in the Circuit Courts of Appeals on the interpretation of an important Federal statute relating to the circumvention by the Internal Revenue Service of the administrative procedures intended to govern the use of John Doe summonses. The statutory framework in question has a substantial impact on the power of the I.R.S. to gather information and on the rights of citizens to be protected from unwarranted government intrusion on their privacy. It also creates an opportunity for curbing potentially serious abuses of the court's process in enforcing I.R.S. summonses. This Court has yet to rule on the issues presented by this case, and its guidance is required to

resolve an admittedly difficult question on the interpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

Statutory framework.

The Internal Revenue Code of 1954, 26 U.S.C. (hereinafter the "Code") Section 7602 authorizes the I.R.S. to examine the books and records of any person in connection with an investigation of the tax liability of any other person. Code Section 7602(c) prohibits use of an administrative summons when there is a Justice Department referral in effect with respect to such person. Code Section 7609 imposes additional limitations on the use of a summons authority. Under Section 7609(f), an I.R.S. summons "which does not identify the person with respect to whose liability the summons is issued" may be served only after the I.R.S. has demonstrated to a court in an ex parte proceeding that it has met the requirements of that section.[5] Under the statute, failure to meet these requirements will force the I.R.S. to obtain a general summons under Code Section 7602. According to the procedures set out in Code Sec. 7609(c), notice must then be given to all identifiable persons, which would include those persons whose cases were pending in United States Tax Court on the "Kersting related cases."

The split in the circuits.

The Circuit Courts of Appeals disagree on the application of the mootness doctrine as to summons compliance

5. These requirements are: (1) that the summons relates to the investigation of a particular person or ascertainable group of persons; (2) that there is a reasonable basis to believe that such persons may have improperly avoided tax; and (3) that the information sought by the I.R.S. cannot readily be obtained elsewhere.

prior to determination on appeal. In *Gluck v. United States*, 771 F.2d 750 (3rd Cir. 1985), the Third Circuit, while noting that their holding perpetuates the conflict between that court and other courts of appeals that have considered the issue, ruled that the surrendering of the documents summoned to the I.R.S. does not end the controversy between the parties. Other Circuits, case in point, *United States v. Arthur Andersen & Co.*, 623 F.2d 720, 722 (1st Cir. 1980), *cert. denied*, 449 U.S. 1021 (1980), have ruled that production of all documents forming the subject matter of an appeal moots the controversy between the parties. *Gluck*, 771 F.2d 750 (3rd Cir. 1985).

In the *Gluck* case, "after the district court refused to quash the summonses or to stay execution of its judgment pending appeal," the summoned third-party fully complied with the I.R.S. summonses. On appeal the I.R.S. argued that this compliance ended any controversy and "mooted the Glucks appeal because the relief sought—prevention of compliance with the summonses—can no longer be granted."

Relying on *United States v. Waltman*, 525 F.2d 371 (3rd Cir. 1975) and *United States v. Friedman*, 532 F.2d 928 (3rd Cir. 1976), the Third Circuit ruled against the I.R.S. assertion that the compliance mooted the appeal. The court reasoned that even though the documents had been surrendered, an appropriate remedy still existed.

> "[I]f we find that the summonses were illegal, we can still fashion a remedy—prohibition of the use of the summoned documents—to afford the Glucks effective relief." *Gluck*, 771 F.2d at 754.

The Third Circuit's decision in *Gluck* was directly contrary to a previous decision by the First Circuit Court of Appeals in *United States v. Arthur Andersen & Co., (supra)*. *Andersen* also involved a third-party summons issued by the I.R.S. Applying the "capable of repetition yet evading review" exception to the mootness doctrine recognized by this Court *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), the appeals court found though the latter prong of the exception—that the controversy be sufficiently likely to be repeated—had been met,[6] that appellant failed the "evading review" test.[7] The court reasoned that a means to obtain appellate review remains in that a third party may refuse to comply and litigate the merits of the summons as a defense to a contempt citation.[8] [9]

In this case, the Ninth Circuit Court of Appeals followed the mechanistic logic of the First Circuit. It ruled that an appeal of the summons enforceability was moot if Petitioner has fully complied, even though Petitioner

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6. Petitioner meets this prong because the I.R.S. summons issued in this case is a part of an ongoing investigation and future summonses of Kersting may be reasonably expected, particularly noting Petitioner has been the target of I.R.S. subpoenaes, summons and search warrant in the past. *See In Re Special April 1977 Grand Jury*, 581 F.2d 589, 591 (7th Cir. 1978), *cert. denied sub nom., Scott v. United States*, 439 U.S. 1046 (1979), *citing Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978).

7. *See e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

8. In so holding in this case, Kersting is now to be subject to the potential of having to pay over $500,000 in penalties which were assessed against him to coerce his compliance in this case ($1000 per day from the date of the order of contempt to the present).

9. Even this remedy was denied Petitioner as he was not permitted to testify at the contempt proceeding, the District Court determining his alleged contempt solely upon pleadings and the argument of counsel.

has already been held in contempt by the district court for his initial refusal to comply. The court reasoned that "[w]hereas it is unreasonable to expect a disinterested third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties. Kersting is clearly not a disinterested third-party."[10]

In the Seventh Circuit decision in *In Re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir. 1978), *cert. denied, sub nom., Scott v. United States*, 439 U.S. 1046 (1979), the court permitted a post-compliance appeal from an order enforcing grand jury subpoenas. In that case, the court stated "[t]he Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test." *Id.*, at 591, *citing Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

It is clear that great conflict exists between the circuits in the application of the mootness doctrine to appeals following summons compliance. The Third and Seventh Circuits recognize the need for and existence of effective relief should the court find the summons to be illegal, while the First and Second Circuits (and by implication the Ninth Circuit) require the summoned party to refuse compliance and risk the outcome of a contempt proceeding in order to obtain their day in court.[11] [12] Given the

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10. Kersting does not concede that he has properly been determined to be an interested third-party.

11. See notes 8 and 9.

12. However, with respect to John Doe summons, the Seventh Circuit holds that compliance moots appeal. *United States v. Kis*, 658 F.2d 526 (1981), *cert. denied* 455 U.S. 1018 (1982).

importance that the statute and the mootness doctrine are interpreted and applied correctly, it is submitted that certiorari should be granted on this ground alone.

The abuse of the court's process.

As stated in *United States v. Powell*, 379 U.S. 48, 58 (1964):

> "It is the court's process which is invoked to enforce the administrative summons and *a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer . . . or for any other purpose reflecting on the good faith of the particular investigation.*" [Emphasis added]

What could be a clearer abuse of the District Court's process than the use by the I.R.S. of a John Doe summons to avoid the notice requirements of Section 7609(a), I.R.C., as is presented here, when the identities of the petitioners in over 1300 United States Tax Court cases are known to the I.R.S. and those persons include persons whose records are summoned herein? Or when the I.R.S. conceals the extent of the documents which it already has in its possession which are responsive to the summons? Or when the I.R.S. conceals the fact of pending criminal referrals? Or when the I.R.S. conceals its prior use of civil summons during the existence of grand jury investigations? Or when those taxpayers, whose identities are known, are available for audit or other discovery?

Challengeability of a John Doe summons.

One aspect of the John Doe summons problem which is in need of address by this Court involves the proper procedure for the issuance and challengeability of a John

Doe summons and the potential abuse of the issuing courts' process in the enforcement of such summonses. The legislative history of Section 7609(f) makes one point indisputably clear: Congress enacted Section 7609 (f) to curb the potential abuse of the John Doe summons process after this Court's decision in *United States v. Bisceglia*, 420 U.S. 141 (1975). In *Bisceglia*, this Court upheld the use of the John Doe summons as long as the I.R.S. was not engaged in a fishing expedition. Congress enacted Section 7609(f) so that a court would supervise the Service's use of John Doe summonses. *See General Explanation of the Tax Reform Act of 1976*, Prepared by the Staff of the Joint Committee of Taxation, December 29, 1976, at 364-69 (reproduced in 1976-3 (Vol. 2) Cum. Bull. 376-82).

A John Doe summons is a direction to a third-party to surrender information concerning taxpayers *whose identity is unknown* to the I.R.S. *See In Re Tax Liabilities of John Does*, 671 F.2d 977, 978 (6th Cir. 1982). Under Sec. 7609(f) of the Code, the I.R.S. may serve such a summons only if it can establish in a court proceeding (1) that the summons relates to the investigation of a particular person or an ascertainable group or class; (2) that there is a reasonable basis for believing that such person or group or class of persons may fail or have failed to comply with any provision of any internal revenue law, and (3) the information sought to be obtained from the examination of records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources. The I.R.S. must seek court approval by filing an ex parte petition in federal district court. 26 U.S.C. Sec. 7609 (h)(1) and (2).

> "Section 7609(f)'s criteria thus constitute a procedural safeguard which Congress created to provide extra protection to unknown target taxpayers to whom the I.R.S. cannot give notice," *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983), *citing United States v. Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 305 (3rd Cir. 1981).

However, a party to whom a John Doe summons is issued could, like those on whom other types of summonses are served, resist enforcement of the summons by challenging the Government's prima facie showing, under a four-part test erected in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The Government must establish that its use of the summons is "in good-faith pursuit" of the purposes authorized by Congress. *United States v. La Salle National Bank*, 437 U.S. 298, 318 (1978). To establish its good faith, the Government must show:

> "(1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to the purpose; (3) *that the information sought is not already within the Service's possession;* (4) *that the administrative steps required by the Internal Revenue Code have been followed.*" *United States v. Church of Scientology*, 520 F.2d 818, 821 (9th Cir. 1975); *See also United States v. Powell*, 379 U.S. 48, 57-58 (1964). [Emphasis supplied]

Once the Government has established its prima facie case, the district court issues an order requiring the party on whom the summons has been served to show cause, at an enforcement hearing, why compliance with the summons should not be required. A non-complying taxpayer,

in responding to a show cause order, must refute the Government's *Powell* showing of good faith to oppose successfully the enforcement of the summons.

> "If the taxpayer is able to make a sufficient showing of bad faith on the Government's part, the taxpayer is entitled to a limited evidentiary hearing." *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, at 1346 (9th Cir. 1983).
>
> "If the court determines that no further discovery is warranted, it will order enforcement; otherwise, it may not decide the enforcement issue until after further discovery has been conducted." *Id.*, at 1347, *citing United States v. Kis*, 658 F.2d 526, 540 (7th Cir. 1981) *cert. denied*, 455 U.S. 1018 (1982).

Petitioner has shown evidence of the I.R.S.'s bad faith in obtaining issuance of the John Doe summons herein. The I.R.S. has presented no competent evidence to refute or overcome the evidence of a pending, unresolved and unterminated criminal referral; and, this alone should destroy the presumption of good faith in the obtaining of the John Doe summons. There is an absolute ban on enforcement of I.R.S. summonses issued after a case has been referred to the Department of Justice for criminal prosecution. *United States v. La Salle National Bank*, 437 U.S. 298 (1978); *Moutevelis v. United States*, 561 F. Supp. 1211 (M.D. Penn. 1983); Code Section 7602(c). Having overcome the prima facie showing of good faith, the district court should have denied enforcement of the John Doe summons herein.

Right to an evidentiary hearing.

This brings us to the question that has yet to be clearly addressed by the Circuits and begs this Court to answer

definitively: What quantum of evidence in opposition to the enforcement of a John Doe summons meets or passes the threshold at which the person summoned must be afforded an evidentiary hearing as to the I.R.S.'s good faith in obtaining the issuance of the John Doe summons?

Petitioner requested but was denied a limited evidentiary hearing on his objections to enforcement of the John Doe summons even though he alleged, by good and competent evidence, that the I.R.S. was acting in bad faith in bringing this action and in seeking the issuance of the John Doe summons. The I.R.S. cannot argue that the identities of the taxpayers, all of whom are in United States Tax Court and designated as "Kersting cases" are unknown to it. Quite the contrary, it plainly disclosed that the identities of those persons were known to it in its Petition for Leave to Serve a John Doe Summons, in its Memorandum of Points and Authorities in Support of Petition for Leave to Serve John Doe Summons, and in the Declaration of Larry Tahara. Appendix K.

The law is clear that the I.R.S. may not use a John Doe summons to compel a third party to surrender information on taxpayers whose identities are known to the I.R.S. *In re Tax Liabilities of John Doe*, 671 F.2d 977 (6th Cir. 1982); cited by *Samuels, Kramer and Co.*, 712 F.2d 1343 (9th Cir. 1983). Both Courts held that the I.R.S. may serve a John Doe Summons *only* if it can establish:

> "*. . . that the information sought, as well as the identity of the person or persons to which the information relates, is not readily available from other sources.*" [Emphasis supplied.]

Perhaps the leading John Doe Summons case is *United States v. Samuels, Kramer and Company*, 712 F.2d 1342 (9th Cir. 1983), wherein the Ninth Circuit repeated the *Powell* four-part, good-faith test. Of particular importance to the instant case is the third step: "the information sought is not already within the Service's possession." By the I.R.S.'s judicial admission, the names of over six hundred investors who were already in United States Tax Court on cases arising out of the so-called "Kersting companies" were known to the I.R.S. at the time the John Doe summons was sought, and the tax years in question on these persons included the tax years which were the subject of the summons. This is conclusively established by Kersting's affidavit filed in the District Court, as part of his Objections to Summons, and the Government's admissions in open court on August 24, 1987 (Transcript of Proceedings on Order to Show Cause, dated August 24, 1987, Appendix J). The I.R.S. had this information in its possession and had ready access to any records of those taxpayers through discovery in the Tax Court; and indeed, through its counsel, stated: "The IRS wants to know the identities of all new investors that Mr. Kersting has acquired in the period 1984, '85 and '86, within the applicable statute of limitations. It has nothing to do with the Tax Court case. It asks for similar information, not identical. *We are not interested in the parties in Tax Court, nor Mr. Kersting.*" [Emphasis supplied, Transcript of August 24, 1987, Appendix J.]

Indeed, Title 26 U.S.C. Section 7609(f) prohibits the use of a John Doe Summons in cases where the information sought to be obtained from the examination of the records (and the identity of the person or persons with

respect to whose liability the summons is issued) is readily available from other sources or is already in the I.R.S.'s possession.

At the very least, Petitioner was and is entitled to a limited evidentiary hearing, which he has so far been denied, on his allegations of the pending criminal referral, the I.R.S.'s knowledge of the identities of the summoned persons, and the ready availability of those persons' records since 600+ of them are in United States Tax Court, in 1300+ pending cases. All of these issues go to the good faith of the I.R.S. in seeking enforcement of the John Doe summons and to Petitioner's right to an evidentiary hearing. Argument of counsel can hardly be said to be a satisfactory substitute for an evidentiary hearing. Indeed, as stated in *Samuels, Kramer & Co.*, 712 F.2d at 1347—

> "[I]f the court determines that no further discovery is warranted, it will order enforcement; otherwise, *it may not decide the enforcement issue until after further discovery has been conducted.*" [Emphasis supplied]

The Circuits have failed to fully address these issues and to provide the protection needed to prevent abuse of the court's process in the enforcement of an I.R.S. John Doe summons. Indeed, the Ninth Circuit seems to have ignored its own decision in *Samuels, Kramer & Co.*, when it issued its opinion herein.

The potential for abuse of a Federal Court's process, by itself, when a Petitioner such as Kersting is denied even a limited evidentiary hearing, merits this Court's review.

Proper enforcement to be given a John Doe summons.

This leads us to ask what is the proper enforcement to be given to a John Doe summons once it is shown that some of the records sought and the identity of hundreds of persons whose records are sought by the summons, are in the possession of the I.R.S.? Properly it would appear that enforcement should be quashed for bad faith by the I.R.S. in its inclusion of these records in their summons request. At the very least, however, enforcement must be limited, and notice required as to these persons whose identities are in fact known to the I.R.S. or whose records are available to the I.R.S. by simple audit.

To the extent that the identities of the taxpayers are known to the I.R.S., the use of the John Doe summons in this case is an attempt by the I.R.S. to avoid the notice requirements incumbent upon the I.R.S. in summons proceedings other than John Doe. Congress never meant for the I.R.S. to be able to avoid giving notice to taxpayers whose identities are known to the I.R.S. by the mere subterfuge of a John Doe summons. The district court did not limit the production of records to persons other than those whose identities were known to the I.R.S., as it should have.

In the District Court's Order of January 14, 1988, the court impermissibly shifted the administrative burden of proof to Petitioner to show who among those whose records were summoned are presently under criminal investigation, despite the fact that the knowledge of the existence of unresolved, pending criminal referrals and the identities of the taxpayers subject to such referrals is peculiarly within the knowledge of the Commissioner. Indeed, under Code Section 7602(c), the criminal referral is presumed to continue once initiated. Further, with the

exception of the letters indicating a referral to a grand jury, to which he is privy, said identities and knowledge are unknown and undiscoverable to Petitioner in the absence of Court process, including a limited evidentiary hearing and discovery. This Court is well aware of the presumption that evidence, in one party's possession, which is not produced, is presumed not to exist, or in the alternative, if it does exist, it is presumed to operate against the possessor. *San Antonio v. Timko,* 368 F.2d 983 (2nd Cir. 1966). The I.R.S.'s protestations of the termination of the criminal referral, absent evidence, should fall upon deaf ears and the district court should not have imposed upon Petitioner the obligation to show who was still under referral.

Neither did the I.R.S., at any time herein, seek to limit the John Doe summons to persons other than those whose identities were known to it or to persons other than those whose records it already had possession of or access to.

The history of Section 7609 shows that Congress clearly meant to put limits on the use of this type of summons, due to the potential for abuse. Indeed, it has been held that it is an affirmative defense to the enforcement of a John Doe Summons that the targets of the investigation are in fact known. *United States v. Pittsburgh Trade Exchange, Inc.,* 644 F.2d 302, 307 (3rd Cir. 1981). As that Court so succinctly put it:

> "Otherwise the John Doe procedure might provide a vehicle for avoidance of the notice requirements in section 7609(a)."

Threats to rights of privacy.

The decision below creates a substantial threat to taxpayers' rights of privacy which Congress specifically sought

to protect. It was privacy rights that Congress was concerned about when it enacted Section 7609(f). In explaining the provision, the Staff of the Joint Committee on Taxation wrote:

> Reasons for change
>
> The use of the administrative summons, including the third-party summons, is a necessary tool for the I.R.S. in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy.
>
> Even prior to the enactment of this provision, the Service has instituted an administrative policy designed to establish certain safeguards in this area. Under this policy, I.R.S. representatives were instructed to obtain information from taxpayers and third parties on a voluntary basis where possible. Where a third-party summons is served, advance supervisory approval was required. In the case of a John Doe summons, the advance supervisory approval was required to be obtained on a high level basis. The Congress decided, however, that these administrative changes, while commendable, do not fully provide all of the safeguards which might be desirable in terms of protecting the right of privacy.

General Explanation of the Tax Reform Act of 1976, supra, at 364-65 (reproduced at 1976-3 Cum. Bull. (Vol. 2) at 376-77).

By circumventing the procedures of Section 7609(f), the I.R.S. clearly infringes of privacy rights which Congress intended to protect when it enacted Section 7609(f).

The cases cited in this petition suggest that the I.R.S. is using John Doe summonses with considerable frequency, and that the rights of a substantial number of people are involved. It is not often that Congress imposes limitations on the I.R.S.'s information-gathering authority. The fact that it did so in Section 7609(f) indicates that Congress considered the privacy rights at stake to be of the utmost importance. The possibility that the integrity of those rights is being compromised warrants this Court's review of the use of such summonses.

Constitutionality of Treasury Regulations.

The reimbursement of costs incurred in complying with a John Doe summons is not regulated by statute, it is set by regulation promulgated by the I.R.S. (§ 301.7610-1). Petitioner requested that his costs be assessed and paid before the summons was complied with, or, at the very least, that he not be required to wait until all production was had and then be subjected to the whim and caprice of some I.R.S. agent as to whether or not he would in fact be paid. Anything less requires Petitioner to front the costs of the Government's discovery. The Secretary, in setting conditions for payment, cannot set a condition which pays less than actual costs. On its face, the regulation does not cover or compensate for the salaries of the persons locating and retrieving summoned material, which amounts to and is a taking without due process and without just compensation, which presents a Fifth Amendment question to this Court.

When this Court reviews the challenged regulation (§ 301.7610-1), it must first determine whether Congress has spoken directly to the precise question at issue (Title 26 U.S.C. Sec. 7610). Clearly, in this case, it has not. If the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute. Clearly, the challenged regulation is not. Nowhere does Congress deny payment of salaries of employees for searching, etc., *except where the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant or attorney of such person.* Code Section 7610(b) [Emphasis added] The Secretary has taken it upon himself to deny reimbursement of salaries in all cases. This is unreasonable, arbitrary and capricious.

The regulation (§ 301.7610-1) is and should be ruled by this Court to be unconstitutional, as being arbitrary and capricious, and amounting to a taking of property without due process or just compensation, in violation of the Fifth Amendment. The term "public use" as used in this Amendment includes property needed for use by the public through its officers and agents in performing official duties delegated to them, which would clearly encompass the records summoned. *United States v. 209.25 Acres of Land*, 108 F.Supp. 454 (D.C. Ark. 1952), *rev'd on other grounds*, 211 F.2d 1, *cert. denied* 347 U.S. 1015. A statute or regulation passed under the taxing power may not be arbitrary or capricious or it will fall before the Due Process of Law clause of the Fifth Amendment. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932). If ever there was an arbitrary and capricious regulation, this is

it, as shown from the very language of the regulation, much less its implementation. Where there is a taking of private property, the determination of just compensation under the Fifth Amendment is *exclusively a judicial function. United States v. New River Collieries Co.*, 262 U.S. 314, 343-44 (1923); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893).

> "It does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." *Miller v. United States*, 620 F.2d 812, 837 (Ct. Claims 1980), *citing Monongahela Nav. Co. v. United States, (supra)*.

If Congress itself cannot set the compensation to be paid, how can the I.R.S.? Such is clearly an arbitrary and capricious regulation and this Court should so find and declare same to be unconstitutional. Likewise, if Congress lacks the constitutional mandate or power to set a statutory scheme whereby expenses faced by summoned parties shall be reimbursed in an amount less than actual costs expended for compliance, then the Commissioner has clearly exceeded the statutory mandate inherent in Title 26 U.S.C. Sections 7602 and 7609 in the pronounced regulation. Since the regulation promulgated must be in harmony with, rather than in conflict with the statutory intent of Congress, the regulation at issue here exceeds the permissible limits of the Commissioner's powers of interpretation. Thus, the regulation is not only unconstitutional, but also in conflict with and violative of the intent of Congress. It should be stricken as unconstitutional or in the alternative, this Court should hold such regulation to be of no force and effect since it is beyond the Commissioner's power to enact. This alone warrants this Court's review.

Reopening of the record.

After the order was entered on January 14, 1988, denying Petitioner's objections to the summons, Petitioner, while beginning compliance with the summons, reviewed summons which had been served upon him in 1982. On advice of and at the direction of his counsel, he contacted his banks and for the first time learned that the very materials which had been summoned from him by the I.R.S. had also been concomitantly subpoenaed to the Grand Jury which was investigating him! Rule 11, F. R. Civ. P., imposes the duty upon the Government's counsel to make reasonable inquiry to determine whether these documents were already in the I.R.S.'s possession when the John Doe summons was requested. This duty was breached. Further, Government counsel and their client concealed the illegal use of summons at the same time as there were pending grand jury proceedings since this would be prima facie proof of the I.R.S.'s bad faith. Once this is shown to exist, the presumption of good faith in obtaining the John Doe summons ceases to exist and the I.R.S. must overcome this showing by good and competent evidence (which was not done in this case).

All of the matters and material set forth in the Statement of the Case (*supra*) relating to the Grand Jury constitutes evidence which was not in Petitioner's possession and which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), F. R. Civ. P. It further is evidence of fraud on the part of the government, misrepresentation and misconduct and brings into serious doubt all of the representations of the government herein with respect to its "good faith", the lack of ongoing criminal proceedings,

and the fact that the records sought are allegedly not in its possession or readily available from other sources. The concealment of this evidence of bad faith and illegal conduct through the concomitant use of summons with grand jury subpoenas, is damning to the Appellee. The District Court's Order impermissibly shifted the administrative burden of proof to Kersting, despite the fact that the knowledge of the existence of the illegal use of the summons at the same time as the grand jury subpoenas was peculiarly within the knowledge of the Commissioner. The failure to adduce these additional necessary facts at the District Court was due to the fraudulent concealment, on the part of the Internal Revenue Service and the United States Government, of facts known peculiarly to them. Specifically, but not by way of limitation, the I.R.S. misrepresented to the District Court and concealed from Petitioner, the fact that the vast majority of all of the records sought for the year 1981, in the summons which was served upon Petitioner, were already within the I.R.S.'s possession, having been subpoenaed to a federal grand jury in Honolulu, Hawaii, in 1982. Further, the prior use of a third-party record-keeper summons during the pendency of an on-going criminal investigation called into serious question any representations of the I.R.S. of the non-existence of an on-going criminal investigation of Petitioner, much less the bad faith, ab initio, of the I.R.S. in seeking the John Doe Summons. The concealment of these documents constitutes fraud on the part of the Appellee and newly discovered evidence which warranted the reopening of the case. This conduct warrants this Court's review.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Filed February 16, 1990)

In the Matter of the Tax Liabilities of: JOHN DOES, Participants in Investment Plans Promoted by Henry Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986

Nos. 88-1738, 88-15549
DC# CV-87-54-ACK
DC# CV-88-68-ACK

UNITED STATES OF AMERICA,
Petitioner-Appellee,
v.
HENRY KERSTING,
Respondent-Appellant.

No. 88-15565
DC# CV-88-68-ACK

UNITED STATES OF AMERICA,
Petitioner-Appellee,
v.
HENRY KERSTING,
Respondent-Appellant,

RICHARD HONGSERMEIER; FIDELA HONGSERMEIER; HOYT W. YOUNG; BARBARA D. YOUNG; ROBERT L. DUFRESNE; CAROLYN S. DUFRESNE; JERRY A. DIXON; PATRICIA DIXON; RALPH J. RINA; TERRY D. OWENS; GLORIA K. OWENS,
Applicants in intervention - Appellants.

ORDER

Before: SNEED, KOZINSKI, and THOMPSON, Circuit Judges.

The panel in the above captioned cases has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX B

In the Matter of the Tax Liabilities of John Does, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

UNITED STATES of America,
Petitioner-Appellee,

v.

Henry KERSTING,
Respondent-Appellant.

UNITED STATES of America,
Petitioner-Appellee,

v.

Henry KERSTING,
Respondent-Appellant,

Richard Hongsermeier; Fidela Hongsermeier; Hoyt W. Young; Barbara D. Young; Robert L. Dufresne; Carolyn S. Dufresne; Jerry A. Dixon; Patricia Dixon; Ralph J. Rina; Terry D. Owens; Gloria K. Ownes,
Applicants in intervention-Appellants.

Nos. 88-1738, 88-15549 and 88-15565.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 2, 1989.

Decided Dec. 13, 1989.

Objections were filed to Internal Revenue Service (IRS) John Doe summons. The United States District Court for the District of Hawaii, Alan Cooke Kay, J., denied motions. Appeal was taken. The Court of Appeals, Sneed, Circuit Judge, held that: (1) remand was required for determination of whether subject of summons complied with it and whether appeal was thus moot, and (2) district court lacked jurisdiction to decide merits of motions relating to summons after appeal was taken from order enforcing summons.

Remanded.

L.T. Bradt, Houston, Tex., for respondent-appellant.

Joe Alfred Izen, Jr., Bellaire, Tex., for applicants-in-intervention-appellants.

William A. Whitledge, Dept. of Justice, Washington, D.C., for petitioner-appellee.

Appeal from the United States District Court for the District of Hawaii.

Before SNEED, KOZINSKI and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

The IRS issued a John Doe summons[1] requiring Henry Kersting to produce documents concerning certain investment plans promoted by him. On January 14, 1988, the district court ordered enforcement of the summons over Kersting's objections. On February 14, 1988, Kersting

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1. "A 'John Doe' summons is, in essence, a direction to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS." *In re Tax Liability of John DOES*, 671 F.2d 977, 978 (6th Cir. 1982) (per curiam).

filed a notice of appeal with this court. On August 31, 1988, the district court denied four subsequently filed motions relating to the summons, three filed by Kersting and one filed by eleven prospective intervenors. The court ruled that it did not have jurisdiction over the matters while Kersting's appeal of the summons enforcement was pending. Kersting and prospective intervenors appeal. We affirm both orders, based on the record before the trial court. We remand for further development of the record and to allow the district court, at its discretion, to consider those motions that have not been rendered moot by Kersting's compliance should he be found to have complied only in part with the summons.

I.

FACTS AND PROCEEDINGS BELOW

This appeal is the consolidation of three cases, two by Kersting and one by the intervenors, relating to the enforcement of a John Doe summons.

A. Case No. 88-1738

On May 15, 1987, the IRS petitioned the district court for leave to serve a John Doe summons on Henry Kersting. In its petition, the IRS alleged that Kersting promoted tax shelters of questionable validity and that it sought the summoned documents in order to identify taxpayers participating in his investment plans.[2] Clerk's Record at 1. On July 1, 1987, the district court autho-

2. The materials summoned included all books, records, papers, and correspondence in Kersting's custody during 1984, 1985, and 1986 relating to investment plans; customer lists and similar documents identifying participants in such plans; books and records from 34 named companies for calendar years 1981 through 1986; and additional documents concerning the 34 named companies for calendar years 1984 through 1986. Clerk's Record at 1.

rized service of the summons pursuant to Section 7609(f) of the Internal Revenue Code.[3] Kersting filed objections to the summons on August 10, 1987, claiming that the summons was issued as "part of an on-going campaign of administrative bad faith" against him on the part of the IRS. He asserted that: (1) the IRS had no basis for stating that it believed that the persons about whom information was sought had not complied with a tax law; (2) the IRS was already in possession of "much of the information" that it sought by the summons, by virtue of its execution of a 1981 search warrant;[4] (3) the IRS was seeking production of documents from 1981 through 1986, even though it purportedly sought to investigate tax years 1984, 1985, and 1986; and (4) the summons was an attempt to circumvent the tax code.[5] Clerk's Record at 7.

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3. Section 7609(f) permits a district court to authorize service of a John Doe summons only if the IRS establishes that:

> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(f) (1982).

4. In January 1981, special agents of the Internal Revenue Service (IRS) Criminal Investigation Division executed a warrant to search Kersting's offices. Among those documents seized were lists of participants in those tax shelter programs prior to the date of the search. The Government claims that audits of these persons resulted about 1,300 pending Tax Court cases related to Kersting's programs.

5. "No summons may be issued . . . with respect to any person if" the IRS has recommended grand jury investigation or criminal prosecution of such person, or if a request has been made for disclosure of that person's tax return. 26 U.S.C. § 7602(c) (1982).

On January 14, 1988, the district court denied Kersting's objections and ordered his compliance with the summons. The court based its decision on: (1) the existence of at least one case in which a Tax Court found some of Kersting's programs to be abusive of the tax code; (2) the fact that "although it is theoretically possible for the Government to obtain *some* of the names of persons who participated in Kersting's programs" based on its existing cases involving persons who had participated in the programs, "a review of cases before the Tax Court will not reveal the names of *all* such persons" (emphasis added); (3) the Government's assertion that records for the years 1981 through 1983 were necessary to investigate properly transactions for 1984 through 1986; (4) the absence of evidence that some of the persons who would be the subject matter of the summons had not been referred to the Department of Justice for criminal prosecution. Clerk's Record at 13. The district court ruled, however, that if Kersting could show "that there is a Justice Department referral for criminal proceedings against any persons as to whom the summons seeks information, the information as to such persons may be withheld." *Id.* On February 14, 1988, Kersting filed an appeal of the district court's January 14 order enforcing the summons.[6] That appeal is the subject of Case No. 88-1738.

Kersting asserted that the summons was a way of obtaining documents to which the IRS's access was denied in Tax Court in a prior case, and of obtaining documents concerning persons who already were under investigation by grand juries. In response to Kersting's objections, the Government denied that it sought to circumvent the Tax Court's ruling, stating that the grand jury investigations in question had been terminated.

6. On February 5, 1988, Kersting filed a motion in district court to stay the execution of the summons pending the disposition of his appeal. That stay was denied on March 17, 1988, and the denial was affirmed by the Ninth Circuit on April 13, 1988.

At a May 31, 1988 hearing, the judge orally held Kersting in contempt, and ordered him to produce the documents specified in the summons.[7] On August 5, 1988, Kersting filed a motion in district court for discharge from prior orders of that court, asserting full compliance. The Government filed opposition papers on September 26, 1988, claiming that Kersting had not fully complied, and listing those documents that Kersting allegedly had not provided. On October 4, 1988, the district court denied Kersting's motion, refusing to address its merits for lack of jurisdiction while an appeal was pending before this court.

B. Case No. 88-15549

Stepping up his barrage of motions, Kersting filed three additional ones in May 1988. These motions sought discovery of evidence (to learn the identity of an alleged informant), disclosure of alleged illegal electronic surveillance of Kersting by the IRS, and the recovery of costs for complying with the summons. On August 31, 1988, the district court denied the three motions, asserting that "jurisdiction over the substance of this action has transferred to the court of appeals." Clerk's Record at 63. It held that its jurisdiction was limited to the enforcement of the summons, and that because the summons

7. The May 31 hearing concerned Kersting's May 6, 1988 motion for relief from the January 14, 1988 order. On June 8, 1988, the district court issued the order denying the motion for reconsideration, stating that "once the notice of appeal" of the January 14 order was filed, "jurisdiction was transferred to the Court of Appeal," and that therefore, the district court "no longer has subject matter jurisdiction over this matter." The court found also that "[a]s further grounds for denial of respondent's motion, . . . it lacks merit under both Rule 60(b)(2) and 60(b)(3)." Clerk's Record at 47. Kersting did not appeal the June 8 order, and therefore its review is not before this court.

had been enforced, 26 U.S.C. 7604 no longer conferred jurisdiction. Case No. 88-15549 is Kersting's appeal of those portions of the August 31 order that pertain to him.

C. Case No. 88-15565

The district court in the August 31 order disposed of one additional motion filed May 31, 1988, by eleven individuals who sought leave to intervene and who alleged that the IRS sought information about them with the summons notwithstanding that the IRS already knew their identities. They moved for intervention as a matter of right and, in the alternative, for permissive intervention. Asserting that "there is no longer any proceeding in which to participate" and that "this court no longer has any jurisdiction" to consider their motions, the district court denied the motions. *Clerk's Record at 63.* This effort to intervene generates the appeal of the portion of the August 31 order that constitutes Case No. 88-15565. This court has appellate jurisdiction of all three cases under 28 U.S.C. § 1291.

II.

STANDARDS OF REVIEW

[1, 2] This court reverses a district court's decision to enforce an IRS summons only if clearly erroneous. *Ponsford v. United States,* 771 F.2d 1305, 1307 (9th Cir. 1985). Whether the district court had jurisdiction to decide Kersting's and the prospective intervenors' motions once the notice of appeal had been filed with this court is a question of law reviewed de novo. *See Dweck v. Japan CBM Corp.,* 877 F.2d 790, 792 (9th Cir. 1989).

III.

DISCUSSION

A. *Mootness*

[3] The record before us is not adequate to determine whether Kersting has, to date, substantially complied with the district court's January 14, 1988 order enforcing the summons. If he has so complied, his appeal of that order is moot.[8] In addition, the prospective intervenors' opposiiton to the summons enforcement, if considered on its merits, also would be made moot by such compliance.[9]

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8. *United States v. Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981). Every circuit that has considered this question, except the Third Circuit, *see Gluck v. United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons. *See, e.g., United States v. Arthur Andersen & Co.*, 623 F.2d 720, 725 (1st Cir.), *cert. denied*, 449 U.S. 1021, 101 S.Ct. 588, 66 L.Ed.2d 483 (1980); *United States v. Deak-Perera Int'l Banking Corp.*, 610 F.2d 89, 89 (2d Cir. 1979); *Kurshan v. Riley*, 484 F.2d 952, 952-53 (4th Cir. 1973) (per curiam); *United States v. Sherlock*, 756 F.2d 1145, 1146-47 (5th Cir. 1985); *United States v. Patmon*, 630 F.2d 458, 459 (6th Cir. 1980) (per curiam); *United States v. Kis*, 658 F.2d 526, 532-34 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982); *United States v. Equity Farmers Elevator*, 652 F.2d 752, 752 (8th Cir. 1981) (per curiam); *United States v. Trails End Motel, Inc.*, 657 F.2d 1169, 1170 (10th Cir. 1981) (per curiam).

9. *See Arthur Andersen & Co.*, 623 F.2d at 723-24. This case holds that whereas it is unreasonable to expect a *disinterested* third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties. Kersting clearly is not a disinterested third party. His zealous opposition to the summons enforcement, as well as the future economic damage he will suffer if clients refrain from investing in his programs because they anticipate that their tax deductions will be disallowed, attest to his clear and direct interest in the IRS investigation that is the substance of this case. *See id.* at 723-24.

Therefore, we remand to the district court for proceedings to determine whether Kersting has substantially complied.

We hasten to point out that even if Kersting's appeal is found to be moot, he may still challenge the legality of the summons. For example, in the event that the Government institutes civil or criminal proceedings against him, he may move to suppress evidence obtained from the enforcement of the summons at trial. *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L. Ed.2d 580 (1971) ("to the extent he may claim abuse of process, [he] may always assert . . . that claim in due course at its proper place in any subsequent trial"); *Securities and Exchange Comm'n v. Laird,* 598 F.2d 1162, 1163 (9th Cir. 1979) (per curiam); *United States v. Kis,* 658 F.2d 526, 533 (7th Cir. 1981), *cert. denied,* 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982). Should Kersting's appeal be moot, the intervenors also would be free to renew their motion to intervene in any challenge to the summons Kersting thereafter might institute. We express no opinion on the likely success of any such motion.

Although we could perhaps remand without resolving the merits of the appeals presently before us, our interest in the expeditious disposition of this case requires us to address the issues on appeal on the basis of the record presently before us. We now turn to these appeals.

B. *Good Faith of the IRS*

[4] We commence with the proposition that there are three factual determinations that a district court must make under section 7609(f) before issuing its ex parte authorization of a John Doe summons. *See supra* note 3;

see also United States v. Samuels, Kramer & Co., 712 F.2d 1342, 1346 (9th Cir. 1983). The party upon whom the summons is served may, however, object to the *enforcement* of the summons and challenge the district court's finding that the IRS has established "that its use of the summons is 'in good-faith pursuit' of the purposes authorized by Congress." *Id.* at 1344 (citation omitted). Kersting's arguments, placed before the district court prior to his appeal, constitute the sole basis for his assertion that the IRS lacked good faith in issuing the summons.

[5] To demonstrate good faith, the IRS must establish a prima facie case, showing that: (1) "the investigation will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within the Commissioner's possession"; and (4) "the administrative steps required by the Code have been followed." *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964); *see also Samuels, Kramer & Co.*, 712 F.2d at 1344; *United States v. Church of Scientology*, 520 F.2d 818, 821 (9th Cir. 1975). The Government must make only a "minimal showing" to satisfy its burden.

[6] The Government's showing in this case clearly meets Kersting's first objection. There was ample basis for believing that the persons about whom records were sought had not complied with the tax law. Somewhat less compelling is the relevance of records pertaining to tax years other than those sought to be investigated. Whereas the relevance of records is clear for "tax years being examined, relevance is not so clear when records for other years are sought." *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). The standard for relevance is

low: "whether the inspection sought might [throw] light on the" matter under investigation; whether the IRS has a "realistic expectation rather than an idle hope that something may be discovered." *Id.* (citations omitted). Yet, as the court in *Goldman* pointed out, the Government's burden, while low, is not nonexistent. In *Goldman*, the Ninth Circuit affirmed a district court's conclusion that the Government had to do more than merely assert relevance to meet the *Powell* good faith standard. For example, in that case, we upheld a district court's finding that the Government had failed to demonstrate relevance where it did not "[refer] to any transaction which might possibly afford a realistic expectation. . . ." *Id.*[10]

In its opposition to Kersting's objections to the summons, the Government stated that "to sort out the transactions for the years under investigation, the agent must be able to start at a point prior to those years." Clerk's Record at 9. The question is whether this assertion meets the standard of relevance. The Government gave no indication how the records would be used other than perhaps to provide "background" for the investigating agent. In light of Kersting's assertion that the records from prior years may assist ongoing grand jury investigations or criminal prosecutions for earlier tax years, the need for relevance is particularly important. However, whatever doubt exists as to whether the Government has met its

10. We noted that if the Government had indicated that it required records from prior years to calculate net worth, for example, the burden might have been met. *Goldman*, 637 F.2d at 667. In addition, the Eleventh Circuit held clearly erroneous a district court's finding that records from prior years were irrelevant where the IRS had asserted that the records were necessary to investigate *changes* in the taxpayer's lifestyle between those years and the years under investigation. *La Mura v. United States*, 765 F.2d 974, 982-83 (11th Cir. 1985).

burden must be resolved in favor of the district court's findings, which were not clearly erroneous.

Kersting's next effort to preclude the establishing of a prima facie case of "good faith" by the IRS was to argue that the information sought was already in the hands of the Service. This was so, says Kersting, because his activities in previous years, which the IRS had investigated, involved many, if not all, of those whose records the IRS now seeks. This contention is equivalent to Kersting saying that the IRS must take his word for what is in his records, which, of course, it is not required to do. The summons had a legitimate purpose: to find out who had been investing in Kersting's schemes. Moreover, even if the IRS knew that some of the 1984 through 1986 investors had invested in earlier years this would not defeat a prima facie case of good faith.

[7, 8] We, therefore, hold that once the IRS has established a prima facie case, the person served with the summons bears the burden of challenging the Government's good faith in its objections to the summons. *Powell,* 379 U.S. at 58, 85 S.Ct. at 255; *Samuels, Kramer & Co.,* 712 F.2d at 1346. "To make a showing of bad faith . . . a taxpayer must 'do more than *allege* an improper purpose'. . . . [A] taxpayer must answer the Government's prima facie case [by alleging] *'specific facts* in rebuttal.' " *Samuels, Kramer & Co.,* 712 F.2d at 1347-48 (citations omitted) (emphasis in original). The burden of rebutting the Government's showing "is a heavy one." *United States v. LaSalle Nat'l Bank,* 437 U.S. 298, 316, 98 S.Ct. 2357, 2367, 57 L.Ed.2d 221 (1978).

[9] Kersting's most serious challenge to the IRS's good faith is his argument that the requested records

concerned some persons already referred for grand jury investigation or criminal prosecution. Yet, the district court authorized Kersting to withhold information as to any persons that he can show have been so referred, and thus rendered harmless the summons. The district court's findings that the IRS made its prima facie showing of good faith and that Kersting failed to rebut this showing are not clearly erroneous.

On the basis of the record before us, we therefore affirm the district court order to enforce the summons.

C. *District Court Jurisdiction of Kersting's and Prospective Intervenors' Post Appeal Motions*

[10] The district court clearly had jurisdiction of matters relating to enforcement of the summons pursuant to 26 U.S.C. §§ 7402(b), 7604(a), prior to Kersting's filing of the notice of appeal on February 14, 1988. In general, however, "filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed. 2d 225 (1982) (per curiam); *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 772 (9th Cir.), *cert. denied*, 479 U.S. 987, 107 S.Ct. 580, 93 L.Ed.2d 582 (1986).

A district court, on the other hand, sometimes retains jurisdiction in matters "collateral" to those resolved in the judgment on appeal, such as motions for attorneys fees. *Garcia v. Burlington N. R.R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987). *Cf. Cox v .American Cast Iron*

Pipe Co., 784 F.2d 1546, 1550-51 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). This rule does not help Kersting. The district court held that Kersting's motions for discovery of evidence and disclosure of alleged illegal electronic surveillance, if related at all to the summons enforcement action, related *directly* to the question of the IRS's good faith, a matter already appealed to this court. We agree. Therefore, the district court was precluded from ruling on these motions.

The same conclusion applies also to the intervenors' motion. Clearly, their proposed intervention concerns the merits of the order to enforce the summons and not a collateral matter. Therefore, the district court correctly denied their motion on the basis that it no longer had jurisdiction.

[11] Although in some instances a motion for costs may be collateral to the action on appeal, *see, e.g., Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir. 1984), *aff'd*, 765 F.2d 1039 (11th Cir. 1985) (motion for costs does not seek reconsideration of substantive issues resolved in the judgment, and therefore does not nullify appeal already filed on merits on action), the district court viewed Kersting's motion for reimbursement of costs of compliance with the summons as "simply another objection to the enforcement" of the summons. Clerk's Record at 63. It determined properly that jurisdiction of the matter had been transferred to the court of appeals. Reimbursement of costs of compliance with an IRS summons are decided pursuant to 26 U.S.C. § 7610 (1982) and 26 C.F.R. § 301.7610-1 (1988), and are not severable from proceedings concerning sum-

mons' authorization or enforcement. Therefore, we affirm the district court's denial of Kersting's motion for costs on the basis that it did not have jurisdiction to decide that motion while his appeal was pending.

D. *Conclusions*

The evidence before us is not adequate to determine whether Kersting has substantially complied with the summons. We remand to the district court for proceedings to determine whether Kersting has complied. If he has, the appeal enforcing the summons is moot with respect to all points raised by Kersting both before and after the appeals considered in this case, with the exception of his motion for costs. The prospective intervenors' challenge to the enforcement of the summons also would be made moot by such compliance. Based on the record before us, which indicates that Kersting's compliance was in doubt as of September 1988, we affirm the district court's January 14, 1988 order enforcing the summons.

We affirm the district court's August 31, 1988 denial of the four motions relating to the summons on the ground that the district court lacked jurisdiction to decide the merits of the motions at that time. We remand to allow the district court, at its discretion, to develop the record further and to decide the motions on their merits should it find that Kersting's opposition to enforcement is not made moot by compliance.

REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Filed June 29, 1989)

In the Matter of the Tax Liabilities of: JOHN DOES,
Participants in investment Plans Promoted by
Henry Kersting During the Calendar Years
1984 and 1986

Nos. 88-1738
88-15549
88-15565

DC# CV-88-68-ACK
Hawaii

UNITED STATES OF AMERICA,
Petitioner/Appellee,

vs.

HENRY KERSTING,
Respondent/Appellant,

and

RICHARD HONGSERMEIER, et al.,
Applicants in Intervention/Appellants.

ORDER

The Government's renewed motion to consolidate appeal Nos. 88-1738, 88-15549 and 88-15565 is granted.

The answering brief is due August 2, 1989. The optional reply briefs are due August 16, 1989.

Appellants' motion in No. 88-15565 to file the late opening brief is granted. The brief received June 1, 1989, and excerpts received June 7, 1989, shall be filed.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ ADRIENNE H. HICKMAN
Ardienne H. Hickman
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

(Filed October 4, 1988)

CIVIL NO. 88-00068 ACK

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

ORDER

Respondent Henry Kersting moved this court on August 5, 1988 to be discharged from prior Orders entered in this case, asserting full compliance therewith. The United States filed papers opposing that motion on September 26, 1988, alleging that respondent has not produced certain documents required by this Court's Orders.

The Order issued by this Court on August 31, 1988 denying various motions of respondent on the ground that this case is on appeal to the Ninth Circuit is dispositive on the motion in question here. With due regard for clarity, the motion is hereby expressly denied.

DATED: Honolulu, Hawaii, OCT. 4, 1988.

/s/ALAN C. KAY
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

(Filed August 31, 1988)

CIVIL NO. 88-00068 ACK

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

ORDER

This matter comes before the court on Respondent Kersting's motions for an evidentiary hearing and for costs of compliance with the John Doe summons which is the subject of this action. Several parties have filed motions to intervene in this matter, and the government has filed a motion for sanctions under Fed. R. Civ. P. 11. A hearing was held on July 5, 1988, and the parties were directed to submit further briefs on various issues. All parties have filed such briefs. The court, having considered these motions, the arguments of counsel, and the briefs which were filed, hereby finds as follows:

On January 14, 1988, this court overruled Respondent Kersting's objections to enforcement of the summons which is the subject of this action, and ordered Kersting to comply with the summons. Kersting filed a notice of

appeal. Following the appeal, Kersting has now either filed or reasserted motions for an evidentiary hearing or for disclosures of alleged illegal surveillance.

Since Kersting has filed a notice of appeal, it is apparent that jurisdiction over the substance of this action has transferred to the court of appeals. Kersting does not dispute this. However, Kersting maintains that this court may hear his motions because the motions involve matters which are collateral to the appealed issues. This is a precarious position, because Kersting must show that although the motions are not relevant to the issues on appeal, they are nevertheless relevant to the issues in the present lawsuit.

Kersting cites *Standard Oil Co. v. United States*, 97 S.Ct. 31 (1970) for the proposition that the court has jurisdiction to reopen the evidence even though the case is pending on appeal. In that case, however, the appeal had been disposed of, and the Court simply held that the trial court had jurisdiction over a Rule 60(b) motion for relief from judgment. The case in no way justifies reopening evidence which bears on the issues which are then on appeal.

Kersting has contended that the issues to be considered in the present motions for disclosure of surveillance and informants are collateral to the issues on appeal. This does not appear to be true, since the only conceivable purpose of such an investigation in the context of this case would be to question the good faith of the IRS in seeking the summons, which is one of the issues on appeal. If, indeed, these motions are being made for some other purpose, then they would be irrelevant to this lawsuit, and this court does not have subject matter jurisdiction

over them: this proceeding is brought pursuant to 26 U.S.C. § 7604, which is limited to the enforcement of a summons. The summons has been enforced, and there are no issues remaining. Kersting has not alleged any independent basis for jurisdiction. Even if this court were to make a factual finding that the IRS has violated Kersting's rights, there is no relief available for those violations in the context of this case.

Kersting has also made a motion for costs of compliance with the summons. Again, jurisdiction over issues relating to the enforcement of this summons has been transferred to the court of appeals. Kersting could have raised the issue of costs in connection with the enforcement question, but did not do so. Kersting raised all of his grounds for challenging the enforcement of the summons before this court ordered enforcement, and the constitutionality of the statutory provisions for payment of costs was not argued. The present challenge, although styled as a motion for costs, is nevertheless simply another objection to enforcement, and all issues relating to enforcement have been appealed. Since the summons was ordered enforced and that order was appealed, all matters relating to the propriety of the enforcement are now in the jurisdiction of the court of appeals. There is no jurisdiction here to now consider whether enforcement in the absence of a payment of costs is constitutional.

Kersting is not left without any hope of reimbursement, however, for he can still seek costs of compliance through the statutory scheme provided for such. *See* 26 U.S.C. § 7610, *Treas. Reg.* § 301.7610-1(c)(1). Although Kersting may not be fully reimbursed for the actual costs of compliance under these regulations, full reimbursement

has not been held to be constitutionally required. *See, e.g., United States v. Continental Bank & Trust Co.*, 503 F.2d 45, 48 (10th Cir. 1974); *United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352 (E.D. Ky. 1977). In addition, Kersting need not have incurred any significant expenditures in compliance with the present summons, since Kersting could have provided the IRS with the originals of the requested documents. Kersting, for his own reasons, chose to incur the added expense of photocopying all of the materials.

Several persons who allege that their records will be disclosed by Kersting's compliance with the summons have made a motion to intervene in this action. At this point, there is no longer any proceeding in which to participate. Even if the intervenors had some right to oppose enforcement of this summons, this court no longer has any jurisdiction to consider such opposition. Finally, the government has made a motion for sanctions against Kersting for violating Fed. R. Civ. P. 11 with regard to these motions. The court does not feel that sanctions are appropriate at this time, but in light of this court's ruling on the jurisdictional issues, any further filings will be closely scrutinized in this regard.

Accordingly, it is hereby ORDERED that Kersting's motion for Disclosure of Illegal Electronic Surveillance is DENIED. Kersting's Motion for Evidentiary Hearing is DENIED. Kersting's Motion for Disclosure of Identity and Agreement With Informants of I.R.S. and Request for Evidentiary Hearing and Discovery is DENIED. Kersting's Motion for Assessment of Costs of Compliance With Summons is DENIED. Intervenors' Motion for

Leave to Intervene is DENIED. The United State's Motion for Attorney's Fees is DENIED.

DATED: Honolulu, Hawaii, AUG. 31, 1988.

/s/ ALAN C. KAY
United States District Judge

IN THE MATTER OF THE TAX LIABILITIES OF JOHN DOES, CIVIL NO. 88-0068 ACK; ORDER DENYING MOTION FOR DISCLOSURE OF ILLEGAL ELECTRONIC SURVEILLANCE, ETC. . . .

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Filed August 8, 1988)

No. 88-1738

DC# CV-87-54-ACK
Hawaii

In the Matter of the Tax Liabilites of: JOHN DOES, Participants in investment Plans Promoted by Henry Kersting during the Calendar Years 1984 and 1986.

UNITED STATES OF AMERICA,
Petitioner-Appellee,

vs.

HENRY KERSTING,
Respondent-Appellant.

ORDER

Before: GOODWIN and PREGERSON, Circuit Judges.

Appellant's motions for a stay and to abate the appeal are denied.

EXHIBIT A

APPENDIX G

(Lodged June 1, 1988)

(Filed June 8, 1988)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 88-00068-ACK

In the Matter of the Tax Liabilities of:

JOHN DOES, participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

ORDER DENYING RESPONDENT'S MOTIONS FOR RELIEF FROM JUDGMENT (OR ORDER) AND FOR ATTORNEY'S FEES

This matter came before the Court on May 23, 1988 at 10:30 A.M. on the motion of respondent, Henry

Kersting, for relief from the order denying his objection to the enforcement of a John Doe summons served upon him, and for attorneys' fees. Respondent was represented by L.T. Bradt and Roger S. Moseley. The United States was represented by Special Assistant United States Attorney Henry E. O'Neill. After review of the written submissions and the oral arguments of the parties, these motions are denied.

On July 6, 1987, this Court issued an order granting leave to the Internal Revenue Service (IRS) to serve a John Doe summons upon respondent, Henry Kersting. The summons seeks information concerning the participant in respondent's tax investment plans for certain years. This summons was served upon respondent, who filed objections thereto on August 10, 1987.

Hearing was held on August 24, 1987, during which respondent's objections were considered, and the matter taken under advisement. On January 14, 1988, the Court issued an order denying respondent's objections to the summons, and ordering that respondent comply with the summons by appearing on March 3, 1988 at 3:00 P.M., as directed in the summons.

On February 4, 1988, respondent filed a notice of appeal. On February 5, 1988, respondent filed a motion for stay pending appeal, which was denied by this Court on March 17, 1988. A similar motion was denied by the Ninth Circuit Court of Appeals on April 13, 1988. Respondent's motion for rehearing and suggestion for rehearing en banc was denied on May 2, 1988.

Respondent has now filed a motion for relief from the order denying his objections, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. However, once the

notice of appeal was filed, jurisdiction was transferred to the Court of Appeal. Because this Court no longer has subject matter jurisdiction over this matter, the motion must be denied. *Gould v. Mutual Life Insurance Co.*, 790 F.2d 769, 772 (9th Cir. 1986); *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir.), judgment vacated on other grounds, 454 U.S. 934 (1981).

As further grounds for denial of respondent's motion, this Court finds that it lacks merit under both Rule 60 (b)(2) and 60 (b)(3).

Finally, respondent has moved for attorneys' fees under 26 U.S.C., Section 7430 and Rule 11 of the Federal Rules of Civil Procedure. This motion for attorneys' fees is likewise denied.

DATED: Honolulu, Hawaii, JUN. 2, 1988.

/s/ ALAN C. KAY
Alan C. Kay
United States District Judge

APPROVED AS TO FORM:

Refused to sign

ROGER S. MOSELEY, ESQ.

In the Matter of John Does, et al.
Civil No. 88-00068 ACK
Order Denying Respondent's Motion for
Relief from Judgment (or Order) and
for Attorney's Fees

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

(Filed March 17, 1988)

CIVIL NO. 88-00068 ACK

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

ORDER DENYING MOTION FOR STAY PENDING APPEAL AND GRANTING 30 DAY INTERIM STAY

On July 6, 1987, this court entered an order granting the IRS leave to serve a John Doe summons on Henry Kersting, giving Kersting leave to file objections to that summons. Objections were filed, and on August 24, a hearing was held on the objections. On January 14, 1988, this court overruled the objections and ordered Kersting to comply with the summons by March 3, 1988. This date was postponed by stipulation so as to allow Kersting to make the present motion for a stay of the required compliance with the summons pending appeal of this court's order.

The standard for grant of a stay pending appeal of a district court's decision to enforce an IRS summons is contained in FRCP Rule 62(c), which governs the stay

of injunctions pending appeal. *United States v. Manchel, Lundy & Lessin,* 477 F. Supp. 326, 334 (E.D. Pa. 1979); *United States v. Puckett,* 573 F. Supp. 713, 716 (E.D. Tenn. 1981). This rule provides that such a stay is granted in the discretion of the trial court, if the party seeking the stay is able to show:

> (1) a strong showing that he is likely to succeed on the merits of the appeal; (2) a showing that, unless a stay is granted, he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest.

Reserve Mining Co. v. United States, 498 F.2d 1073, 1076-77 (8th Cir. 1974); *Pitcher v. Laird,* 415 F.2d 743, 744-45 (5th Cir. 1969). In *In re Turner,* 309 F.2d 69 (2d Cir. 1962), the court held, with regard to an IRS summons, that a stay pending appeal "should not be granted as a matter of course, but only when there is a substantial possibility of success . . ." *Id.* at 72.

With regard to the merits of his appeal, Kersting argues that he is likely to prevail on his contention that this summons is not being sought in good faith by the IRS, because this court impermissibly shifted the burden of proof on this issue to him. Kersting's attorney insists that he knows of thirty people who have had criminal referral letters that have not been withdrawn, and that the government bears the burden of establishing that none of the persons whose identities would be disclosed by the summons presently have criminal proceedings against them. This contention, unsupported by any citation, seems absurd on its face, since the basis of the John Doe summons is that the government is unaware of the identities

of the persons whose records are being sought, and therefore would not know whether there were any criminal prosecutions outstanding as to those persons. This court has previously found that the summons was being sought properly to ascertain the identities of persons unknown, and to require the IRS to prove that there is no criminal referral outstanding as to these unknown persons would be an impossible burden to meet. Moreover, this court conditioned its order enforcing this summons by providing that upon a showing that there is a Justice Department referral for criminal proceedings against any persons as to whom the summons seeks information, the information as to such person may be withheld.

In addition, the burden of proof on the issue of the government's good faith has not been shifted to Kersting, since the government was required to make out a prima facie case. Such is properly established by a declaration by the IRS agent that the summons is being sought for a proper purpose. *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1344-45 (9th Cir. 1983). If one who is subject to a summons contends that in fact the IRS is seeking the summons for an improper purpose, they have the burden of showing that the purpose as stated by the IRS is in fact false: ". . . those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." *United States v. LaSalle Nat. Bank*, 98 S. Ct. 2357, 2367 (1978). The taxpayer has the burden of showing not only the subjective intent of the IRS agents to proceed criminally with the information sought by the summons, but also that the IRS as an institution also had the sole intent of doing so. *Id.* The IRS in this case properly alleged a proper purpose

for the summons, and although Kersting submitted evidence in opposition, this court held that the summons was in fact being sought in good faith by the IRS.

Kersting asserts that this court denied him an evidentiary hearing on the good faith issue, as is required by *Samuels, Kramer & Co.*, supra. Even if Kersting had made a sufficient showing to justify such a hearing, no request for an additional evidentiary hearing was made, and the issue was submitted to the court on the evidence filed with the court and the oral arguments made at the initial hearing.

Review of this court's order will be under the abuse of discretion standard, *United States v. Author Services, Inc.*, 804 F.2d 1520, 1524 (9th Cir. 1986), amended, 811 F.2d 1264 (9th Cir. 1987); *United States v. Vallance*, 793 F.2d 1003, 1005 (9th Cir. 1986), and success on appeal is unlikely on that basis. *See United States v. Key Oil Co.*, 460 F. Supp. 878, 880 (D.N.J. 1979).

With regard to irreparable injury, Kersting asserts that unless a stay is granted, his appeal of this court's order will be rendered moot, since he would be forced to comply with the summons before the appeal could be considered. This would appear to be the case, although Kersting does not explain the nature of any prejudice to him arising out of his compliance with the summons itself. It is also true, as the government conceded at the hearing, that persons whose records are disclosed by Kersting's compliance with the summons would not have the opportunity to challenge the use of those records later on, if indeed the summons was improperly obtained.

On the other hand, there would also appear to be serious harm to the public interest if a stay is granted.

Delay in compliance with the summons could impede an ongoing investigation, and could allow the statute of limitations to run. Continued delay could also result in the deterioration of memories and the unavailability of witnesses and evidence. This court finds that there are substantial government interests which could be seriously harmed by a stay pending appeal in this matter.

Accordingly, although Kersting has shown possible irreparable injury to himself and to others whose interests are implicated by the summons, there has been no showing of likelihood of success on appeal, and there appears to be a substantial risk of harm to the government and the public interest. IT IS HEREBY ORDERED that the motion for a stay pending appeal is DENIED. However, in order to allow an opportunity to apply for a stay from the court of appeals, a limited stay of the enforcement of this summons is granted until thirty (30) days from the date of this order.

DATED: Honolulu, Hawaii, MAR. 17, 1988.

/s/ ALAN C. KAY
United States District Judge

IN THE MATTER OF TAX LIABILITIES OF JOHN DOES; CIV. NO. 88-00068 ACK ORDER DENYING MOTION FOR STAY PENDING APPEAL

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

(Filed January 14, 1988)

MISC NO. 87-0054

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, and 1986.

ORDER DENYING OBJECTIONS TO SUMMONS

On July 6, 1987, this court issued an order granting leave to the Internal Revenue Service (IRS) to serve a John Doe summons upon Henry Kersting. This summons required Kersting to provide the IRS with information concerning participants in Kersting's investment plans. The order was based on findings (1) that the summons related to the investigation of an ascertainable group or class of persons, that is, taxpayers who have participated in investment plans promoted by Henry Kersting in the calendar years 1984, 1985, and 1986; (2) that there is a reasonable basis for believing that such group or class of persons may have failed to comply with various provisions of the Internal Revenue Code of 1986 (26 U.S.C.); and (3) that the information sought to be obtained is not readily available from other sources. Kersting was directed to comply with the summons on August 24, or else to file

objections and appear before the court on that date to show cause why the summons should not be enforced. Kersting filed objections, and a hearing was held on August 24. The court, having heard arguments by counsel for Kersting and the Government, and having reviewed the memoranda and evidence submitted by both parties, finds as follows:

In order to obtain enforcement of a John Doe summons, the Government must show that the summons is sought in good faith, for purposes authorized by Congress. In *United States v .Powell,* 379 U.S. 48, 85 S.Ct. 248 (1964), the Supreme Court stated that in order for the Government to obtain enforcement of a summons, it must show:

> that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed.

Powell, 379 U.S. at 57-58.

The purpose of this summons is to investigate possible violations of the Internal Revenue Code by persons who have participated in Kersting's investment programs. In granting leave to serve the summons, this court made the determination that there was a reasonable basis for believing that there have been violations by these persons. Kersting asserts that there was no reasonable basis for such a belief, since one of his programs was upheld in Tax Court. That case, however, apparently involved a small amount of money, and under 26 U.S.C. § 7463(b) could not be appealed and cannot be cited as precedent

for any other case. Other cases have not upheld Kersting's programs. *Pike v. Commissioner*, 78 T.C. 822 (1982).

Kersting also questions the relevance of at least some of the information sought by the summons. The standard of relevance is very low. *La Mura v. United States*, 765 F.2d 974, 981 (11th Cir. 1985) ("might throw light on the correctness of the taxpayer's return"); *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). In this case, although the government seeks information regarding transactions which occurred in years as to which the statute of limitations has run, such information is relevant to the investigation of later years. *See La Mura, supra*, at 982-983.

Kersting also objects that since there are already pending before the Tax Court a number of cases involving persons who participated in his programs, the government already knows their identities and thus is using the summons to obtain information already in the government's possession. However, although it is theoretically possible for the Government to obtain some of the names of persons who participated in Kersting's programs, a review of cases before the Tax Court will not reveal the names of all such persons.

Kersting has alleged that some of the persons included in the information sought by the summons have been referred to the Department of Justice for criminal prosecution. The Government has asserted that although some individuals involved with Kersting's programs were subject to a grand jury investigation, that referral to the Justice Department has since been withdrawn. Kersting has not submitted any evidence of Justice Department referral of persons who would be the subject of this

summons. If Kersting is able to show that there has been a referral, information regarding that person or persons need not be provided.

On August 20, 1987, Kersting filed a motion for disclosure of Illegal Electronic Surveillance. This motion was not properly before the court at the hearing on August 24 regarding the objections to the summons, and has not since been renewed. Leave is hereby granted to take appropriate action to pursue this issue should Kersting wish to do so.

Accordingly, it is hereby ORDERED that the summoned party's Objections to Summons is DENIED, provided, however, that upon a showing by the summoned party that there is a Justice Department referral for criminal proceedings against any persons as to whom the summons seeks information, the information as to such person may be withheld. The summoned party is ordered to appear and produce his records, as directed by the summons, on the 3rd day of March, 1988, at 3:00 P.M.

DATED: Honolulu, Hawaii, JAN. 14, 1988.

/s/ ALAN C. KAY
United States District Judge

IN THE MATTER OF TAX LIABILITIES OF JOHN DOES, MISC NO. 87-0054; ORDER DENYING OBJECTIONS TO SUMMONS

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Miscellaneous Numbers 87-54 and 87-14

In the Matter of the Tax Liabilities of John Does, etc.

ORDER TO SHOW CAUSE

Proceedings had in the above-entitled matter on Monday, August 24, 1987, commencing at 3:00 p.m., in the Ana Kaulike Courtroom of the PJKK Federal Building, 300 Ala Moana Boulevard, Honolulu, Hawai'i, before the Honorable Alan C. Kay.

PRESENT:

MICHAEL CHUN
Assistant U. S. Attorney
300 Ala Moana Boulevard
Honolulu, Hawai'i 96850

for the United States;

ROGER S. MOSELEY
Attorney at Law
1753 Kumakani Loop
Honolulu, Hawai'i 96821

and

L. T. BRADT
Attorney at Law
4216 Lockefield
Houston, Texas 77092

for Henry Kersting.

* * *

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* * *

MR. CHUN: Your Honor, this is not—this has nothing to do with the tax court case. Mr. Bradt has tried to make this look like we have brought this case for use in tax court. That is just not the case.

The I.R.S. wants to know the identities of all new investors that Mr. Kersting has acquired in the period 1984, '85 and '86, within the applicable statute of limitations.

It has nothing to do with the tax court case. It asks for similar type information, not identical. We are interested in other taxpayers. We are not interested in the parties in tax court, nor Mr. Kersting. We are asking for information in—from '81, '82 and '83 for the following reasons.

* * *

APPENDIX K

(Filed May 15, 1987)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MISC. NO. 87-0054

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985 and 1986.

PETITION FOR LEAVE TO SERVE A JOHN DOE SUMMONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF LARRY TAHARA; EXHIBIT A

PETITION FOR LEAVE TO SERVE A JOHN DOE SUMMONS

For its petition, the United States of America, by its undersigned attorneys, alleges as follows:

1. This proceeding is brought under the authority of Sections 7402 and 7609(f) and (h) of the Internal Revenue Code of 1986 (26 U.S.C.) for leave to serve a John Doe summons, a true copy of which is attached to the Declaration of Larry Tahara as Exhibit A (hereinafter the summons).

2. The United States, through the Internal Revenue Service, has begun an investigation to determine the correct tax liabilities of participants in investment plans promoted by Henry Kersting. The identities of the participants in investment plans promoted by Henry Kersting during 1984, 1985, and 1986 are not readily available from any source other than directly from Mr. Kersting. Once the identities of these individuals are determined, the examination of their tax liabilities for the years 1984, 1985, and 1986 can proceed.

3. This Court has jurisdiction over this matter under 26 U.S.C. § 7609(h)(1) because the summoned party, Henry Kersting, resides and does business within the jurisdiction of this Court.

4. James Kajiki, Chief of the Examination Division of the Internal Revenue Service, has assigned Revenue Agent Larry Tahara to conduct an investigation into the tax liabilities of investment schemes promoted by Henry Kersting. Pursuant to his authority under the internal revenue laws, and to obtain the information needed, Mr. Kajiki has caused a John Doe summons to be issued.

The summons has been reviewed by the District Counsel of the Internal Revenue Service, at Honolulu, Hawaii.

5. Henry Kersting has a documented history of promoting certain tax shelters. The factor these tax shelters have in common is their purported intent to generate substantial interest deductions for their participants to reduce the participants' income tax liability. The tax shelters purport to generate these interest deductions through the use of circular "check-swapping" devices.

6. The "check-swaps" employed by these tax shelters, pursuant to which the corporations and participants make loans to each other and write each other checks, give the appearance of a genuine transaction and a genuine transfer of funds from one entity to another. However, these transactions require no real money to exist in the accounts of the entities involved. Moreover, these "check-swaps" involve multiple loans which appear to lack *bona fides* because of the lenders' use of non-negotiable checks, lack of collection on the notes, and the ability of the investors to cancel the notes at any time without any additional cash payments.

7. The United States has successfully litigated the *bona fides* of similar tax shelters promoted by Mr. Kersting in the past. The case of *Pike v. Commissioner,* 78 T.C. 822 (1982) concerned two different tax shelters organized and promoted by Mr. Kersting, an "auto leasing plan" and an "acceptance corporation plan." Both of these tax shelters involved the incorporation of several corporations by Mr. Kersting, followed by numerous transactions, particularly loans, among those corporations and the participants in the tax shelters. The Tax Court disallowed the deductions sought with respect to both

tax shelters after it determined that there did not exist any true indebtedness and that no interest had in fact been paid.

8. There are currently pending approximately 1,300 cases docketed in the United States Tax Court which involve various tax shelter investment plans promoted by Mr. Kersting. In connection with these tax shelter schemes, Mr. Kersting caused the incorporation of the 34 corporations referred to in the summons. All of these corporations are inter-related and play a part in the "check-swapping" scheme. The transcripts of accounts maintained by the Internal Revenue Service disclose that no federal income tax returns have been filed by these 34 corporations for the years 1984, 1985, and 1986.

9. The "check-swaps" employed by these tax shelters, pursuant to which the involved entities write each other checks, give the appearance of a genuine transaction and a genuine transfer of funds from one entity to another. However, these transactions require no real money to exist in the accounts of the entities involved. Moreover, these "check-swaps" involve multiple loans which appear to lack *bona fides* because of the lenders' use of non-negotiable checks, lack of collection on the notes, and the ability of the investors to cancel the notes at any time without any additional cash payments.

10. Based upon the facts outlined above, there is a reasonable basis for believing that the participants in the tax shelters promoted by Mr. Kersting have incorrectly reported the tax due on their federal income tax returns.

11. The identities of the participants in the tax shelters promoted by Mr. Kersting, and the documents and other

data sought in this investigation, are not readily available from any other source.

12. The summons relates to the investigation of an ascertainable group or class of persons (the participants in the investment plans promoted by Henry Kersting) and there is a reasonable basis for believing that this group may have failed or has failed to comply with provisions of the internal revenue laws.

13. The declaration of Larry Tahara is attached hereto and incorporated herein by this reference.

WHEREFORE, the United States of America respectfully prays:

1. That this Court enter an order permitting service of the summons on the summoned party.

2. That this Court grant such other relief as is just and proper.

Dated this 8th day of May, 1987.

DANIEL BENT
United States Attorney

MICHAEL CHUN
Assistant United States Attorney

/s/ DAVID BUNNING
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MISC. NO. _____

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985, 1986.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR LEAVE TO SERVE A JOHN DOE SUMMONS

This is an *ex parte* proceeding brought by the United States of America pursuant to Sections 7402 and 7609 (f) and (h) of the Internal Revenue Code of 1986 (26 U.S.C.) for leave to serve a John Doe summons.

The issues raised by this proceeding are (1) whether the United States has demonstrated that the Internal Revenue Service summons relates to an ascertainable group or class of persons; (2) whether the Internal Revenue Service has a reasonable basis for believing that such group or class of persons might fail or has failed to comply with any provision of the internal revenue laws; and (3) whether the information sought to be obtained from the examination of the records, *i.e.*, the names, addresses, and other information set forth in the summons regarding the persons or entities with respect to whose liabilities the summons is issued, is not readily available from other sources. If the United States establishes that the requirements of the relevant statutes are met, leave of Court should be granted for service of the John Doe summons.

QUESTION PRESENTED

Whether the requirements of 26 U.S.C., Section 7609 (f), which statute governs the issuance of a John Doe summons, are satisfied in this case.

STATEMENT

The pertinent facts are reflected in the declaration of Internal Revenue Service Revenue Agent Larry Tahara, attached to the Petition. It is necessary to examine the records specified in the summons in order to investigate properly the income tax liabilities of the participants in investment plans of Henry Kersting for the years 1984, 1985, and 1986.

The information sought to be obtained from an examination of the records specified in the summons is not

readily available from a source other than Henry Kersting. Based on its experience in resolved and pending cases in the United States Tax Court, as set forth in the declaration of Larry Tahara, the Internal Revenue Service has a reasonable basis for believing that the participants in the investment plans of Henry Kersting may have failed to comply with provisions of the Internal Revenue Code regarding the deductibility of certain expenses, including interest, and the claiming of certain credits.

ARGUMENT

THE PREREQUISITES OF 26 U.S.C. § 7609(f) HAVE BEEN SATISFIED

Section 7601 of the Internal Revenue Code requires the Secretary of the Treasury to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and make inquiries concerning all persons therein who may be liable to pay any internal revenue tax * * *." 26 U.S.C. § 7601. Section 7602 of the Internal Revenue Code authorizes the Secretary to summon records and testimony for that purpose. Specifically, 26 U.S.C. § 7602 states—

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> (a) *Authority to Summon, Etc.*—For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax * * *—
>
> * * * * *

> (2) To summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * * or any person the Secretary or his delegate may deem proper, to appear * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *. (Emphasis added.)

* * * * *

26 U.S.C. § 7602

Section 7602 of the Internal Revenue Code is the principal information-gathering tool of the Secretary of the Treasury and the Supreme Court has broadly construed it to further the effective conduct of tax examinations. Indeed, the Court has repeatedly rejected attempts to circumscribe or thwart the effective exercise of the Internal Revenue Service summons power. *See e.g., Fisher v. United States,* 425 U.S. 391 (1976); *Couch v. United States,* 409 U.S. 322, 338 (1973), *see also United States v. Bisceglia,* 420 U.S. 141, 144-48 (1975) (holding that Sections 7601 and 7602 empower the Treasury to issue a "John Doe" summons to a bank to discover the identity of a person who had engaged in certain bank transactions); *United States v .Euge,* 444 U.S. 707 (1980).

Bisceglia has been explicitly codified in 26 U.S.C. § 7609(f), as added to the Internal Revenue Code by the Tax Reform Act of 1976. Section 7609(f) states:

> (f) *Additional Requirements in the Case of the John Doe Summons.*—Any summons described in subsection (c) which does not identify the person

with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(f).

Section 7609(h) further provides that—

(h) *Jurisdiction of District Court; Etc.*—

(1) *Jurisdiction.*—The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). * * *

(2) *Special rule for proceedings under subsections (f) and (g).*—The determinations required to be made under subsections (f) and (g) shall be made *ex parte* and shall be made solely on the petition and supporting affidavits. (Emphasis added.)

* * * * *

26 U.S.C. § 7609(h).

It is clear that the first requirement of 26 U.S.C. § 7609 (f) is satisfied in this case. The group or class of persons is precisely ascertainable. The summons relates to the persons who participated in the investment plans promoted by Henry Kersting during the calendar years 1984, 1985, and 1986.

Likewise, the second requirement of 26 U.S.C. § 7609 (f) is satisfied. The particularly lenient standard of 26 U.S.C. § 7609(f)(2), *i.e.*, reasonable basis, has been set for good reasons, as the Supreme Court noted in *Bisceglia*:

> Of necessity, the investigative authority so provided [in 26 U.S.C. §§ 7601 and 7602] is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists * * *. The purpose of the statutes is not to accuse but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business and records.

Bisceglia, 420 U.S. at 146.

As is fully set forth in the Petition of the United States, the history of Henry Kersting as the architect of an interlocking web of corporations used to generate deductions to reduce the federal income tax liabilities of the participants of his investment programs is well established. The case of *Pike v. Commissioner*, 78 T.C. 822 (1982) documents two distinct such tax shelters in which the participating taxpayers had understated their federal income tax liability by claiming deductions based upon multiple transactions with the many corporations set up by Mr. Kersting. The Declaration of Larry Tahara shows

the existence of 1,300 currently docketed Tax Court cases involving the participants' tax liability. There is thus a reasonable basis for believing that the participants of these investment plans may have failed to correctly state their federal income tax liabilities.

The third test of 26 U.S.C., Section 7609(f) is also satisfied here. The information sought is not readily available from a source other than the summoned party. The Internal Revenue Service has no information about the identities of the participants in Mr. Kersting's investment programs after January of 1981, other than identification through an occasional tax return selected for audit for other reasons, or examination of later tax returns of those taxpayers involved in *Pike v. Commissioner, supra*. Moreover, the Declaration of Larry Tahara shows that the 34 corporations have not filed a federal tax return in the past three years; thus, the Internal Revenue Service has been denied the benefit of whatever light these returns might shed on the identity of the participants in the investment programs. That information, readily available to Mr. Kersting, will provide the precise and complete information necessary to the investigation by the Internal Revenue Service.

CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court to issue an order granting leave to serve the John Doe summons on Henry Kersting.

DATED this 8th day of May, 1987.

Respectfully submitted,

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United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MISC. NO. _____

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985 and 1986.

DECLARATION OF LARRY TAHARA IN SUPPORT OF PETITION FOR LEAVE TO SERVE JOHN DOE SUMMONS

I, LARRY TAHARA, in accordance with the provisions of 28 U.S.C. Section 1746, declare and state the following:

1. I am a Revenue Agent of the Examination Division of the Honolulu Office of the Internal Revenue Service, performing my duties under the District Director of Internal Revenue for the Honolulu District. I have been a Revenue Agent for 24 years and have experience in small business, individual, large corporations, trust, and tax shelter tax investigations.

2. In my capacity as a Revenue Agent and for the reasons explained in the remainder of this Declaration, I am conducting an investigation into the tax liabilities of participants in investment plans promoted by Henry Kersting. Mr. Kersting, using 34 corporations formed for this purpose, has promoted various tax shelter programs which purport to generate substantial interest deductions for their participants through the use of circular "check-swapping" devices.

3. In connection with his tax shelter promotions, Mr. Kersting has caused the incorporation of the 34 corporations reflected in the summons. All the corporations are inter-related in the "check-swapping" device. The transcripts of account maintained by the Internal Revenue Service disclose that no federal income tax returns have been filed by these corporations for the years 1984, 1985, and 1986.

4. Although the "check-swaps" employed by the Kersting plan give the appearance of real transactions and a real flow of money, these transactions require no real money to exist in the accounts of the parties involved. The scheme involves the use of numerous corporations which then engage in a complex but economically non-existent series of transactions involving loans to and from the participants and the corporations. These loans do not

appear to be bona fide because of their use of non-negotiable checks by the lenders, lack of collection on the notes, and the ability by the investor to cancel the note at any time without any additional cash payments.

5. The Internal Revenue Service has successfully litigated the bona fides of other similar tax shelter programs promoted by Mr. Kersting. In *Pike v. Commissioner,* 78 T.C. 822 (1982), the Tax Court held that in connection with an "auto leasing plan" and an "acceptance corporation plan" promoted by Mr. Kersting, both of which plans also involved the use of multiple corporations and "check swapping," the purported interest deductions were not allowable as there did not exist any true indebtedness and no interest was in fact paid.

6. There are currently approximately 1,300 cases docketed in the United States Tax Court involving various tax shelter investment plans promoted by Henry Kersting.

7. Other than examining the tax returns for those taxpayers who have cases docketed in the United States Tax Court, the Internal Revenue Service has no way to identify any of the participants in Mr. Kersting's tax shelter programs. Specifically, the Internal Revenue Service has virtually no information regarding the identities of taxpayers who became participants in Mr. Kersting's programs after January, 1981, other than an occasional taxpayer who might have been discovered after his return was selected for audit for other reasons.

8. The information, documents, and other data sought by the summons are critical to the continuation and success of the investigation referred to in Paragraph 2 above. In order to continue that investigation, the Internal Reve-

nue Service must examine the summoned records in order to identify all persons who are participants in the tax shelter plans promoted by Henry Kersting. The records of the 34 named corporations will help establish the existence of the check-swapping scheme and the non-allowability of the deductions claimed by the involved taxpayers as a result of their participation in Mr. Kersting's tax shelter plans. The corporate records will also identify the participants in Mr. Kersting's investment programs.

9. The subject summons is related to the investigation of an ascertainable group or class of persons and there is reason to believe that this group or class of persons may fail or may have failed to comply with provisions of the Internal Revenue laws. To the best of my knowledge, the information and documents sought by the summons are not already available from sources other than Henry Kersting.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 1987, at Honolulu, Hawaii.

/s/ LARRY TAHARA
Larry Tahara
Revenue Agent
Internal Revenue Service

EXHIBIT A

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

SUMMONS

In the matter of: The tax liabilities of John Does who were participants in investment plans promoted by Henry Kersting during the calendar years 1984, 1985 and 1986.

Internal Revenue District of Honolulu.

Periods ended December 31, 1984, 1985 and 1986.

To: Henry Kersting, President and/or Custodian of the books and records.

At: 4211 Waialae Avenue, Suite 501, Honolulu, Hawaii 96819.

You are hereby summoned and required to appear before Larry Tahara an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

Business address and telephone number of Internal Revenue Service officer named above: PJKK Federal Building, Room 2104, Honolulu, Hawaii 96850. Telephone: 541-1140.

Place and time for appearance: at PJKK Federal Building, Room 2104, Honolulu, Hawaii 96850 on the ____ day of _____, 19__ at ____ o'clock __M.

Issued under authority of the Internal Revenue code this 13th day of May, 1987.

/s/ Signature Illegible
Acting Chief,
Examination Division

Attachment to Summons

Summons Issued to Henry Kersting in the Matter of John Does for the periods ending December 31, 1984, December 31, 1985 and December 31, 1986.

I. For the calendar years 1984, 1985 and 1986.

A. All books, records, papers and correspondence in your custody and control during 1984, 1985 and 1986 relating to any and all participants in any investment plan promoted by Henry Kersting.

B. Customer lists or any similar documents identifying the names, addresses and/or social security numbers of any and all participants in any investment plan promoted by Henry Kersting.

II. For the following entities from the period January 31, 1981 through December 31, 1986, the books and records set forth at III.A. through III.F., below.

1. Afton Corporation
2. Anseth Company
3. Anseth Holding, Inc.
4. Anseth Leasing Corp.
5. Atlas Funding Corp.
6. Atlas Guarantee Corp.
7. Avalon Acceptance Corp.
8. Avista Incorporated
9. Aztech Acceptance Corp.
10. Bauspar Holding, Inc.
11. Bauspar, Inc.
12. Candace Acceptance Corp.
13. Charter Financial (FKA Colt Financial Corp.)
14. Delta Acceptance Corp.

15. Escon Financial Corp.
16. Escon Leasing, Inc.
17. Fargo Acceptance Corp.
18. Federal Finance and Mortgage Co. (FKA Cosmopolitan Financial, Ltd.)
19. Federal Finance Co.
20. Federated Finance Co. (FKA Confidential Finance Co.)
21. Federated Financial Corp. of Nevada
22. First Atlas Funding
23. Forbes Acceptance Corp.
24. Investors Financial Corp.
25. Lombard Acceptance Corp.
26. Mahalo Acceptance Co.
27. Norwick Acceptance Corp.
28. Sequoia Acceptance
29. Signet Financial, Inc.
30. Universal Corp.
31. Universal Leasing
32. Ventures Funding Corp.
33. Windsor Acceptance Corp.
34. World Finance and Mortgage Corp.

A. Cash receipts journal
B. Cash disbursements journal
C. Loan register
D. General ledger
E. Any and all other books of original entry
F. All work sheets, financial statements, and account analysis

III. For the calendar years 1984, 1985, and 1986 with respect to all the entities named above.

A. Bank statements, cancelled checks and deposit slips for all checking accounts maintained by said entities for the years 1984, 1985 and 1986.

B. Copies of all documents reflecting transactions between any and/or all of said entities, as well as any other corporation or entity in which Henry Kersting was an officer, director, or shareholder, or incorporator.

C. Copies of all loan documents, agreements or contracts and loan applications.

D. Copies of any and all advertising or other documentation of advertising placed by said entities in newspapers, radio stations, television stations, or other advertising media.

APPENDIX L

(Lodged May 15, 1987)

(Filed June 2, 1987)

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DAVID BUNNING
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Ben Franklin Station
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Telephone: (202) 724-6545

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MISC. NO. 87-0054

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985 and 1986.

ORDER

Upon the petition for leave to serve a John Doe summons, the declaration attached thereto, and the memo-

randum of law submitted by the United States by its attorneys, the Court has determined: (1) that the summons relates to the investigation of an ascertainable group or class of persons, that is, taxpayers who have participated in investment plans promoted by Henry Kersting in the calendar years 1984, 1985, and 1986; (2) that there is a reasonable basis for believing that such group or class of persons may have failed to comply with various provisions of the Internal Revenue Code of 1986 (26 U.S.C.); and (3) that the information sought to be obtained from the examination of the records (and the identities of the persons with respect to whose liabilities the summons is issued) is not readily available from other sources.

IT IS THEREFORE ORDERED that the Internal Revenue Service, through an authorized officer or agent, may serve the John Doe summons, a copy of which is attached hereto as Exhibit A, upon Henry Kersting, seeking the information set forth therein.

IT IS FURTHER ORDERED that, if the summoned party has no objection to complying with the subject summons, the summoned party shall appear before Revenue Agent Larry Tahara, or any other proper official of the Internal Revenue Service, on the ____ day of _____, 1987, at _____ __.M., at the place specified in the subject summons (or such time and place as shall be otherwise agreed to by Revenue Agent Larry Tahara or any other proper official of the Internal Revenue Service), and the summoned party shall then and there give the testimony, under oath, and produce for examination and copying documents as demanded and described in the summons.

IT IS FURTHER ORDERED that, if the summoned party objects to compliance with the subject summons, or any part of it, the summoned party shall appear before the United States District Court for the District of Hawaii in the Courtroom presided over by the undersigned Judge, on the 8th day of July, 1987, at 9:00 A.M., and show cause why the subject summons should not be enforced. In such event, the summoned party shall file and serve on the United States Attorney for the District of Hawaii and upon the Attorney General of the United States, at least (ten) 10 business days prior to the date set forth above for such hearing, written objections stating each and every ground for the failure to comply with the summons, supported by appropriate affidavits as well as any motion the summoned party desires to make. All motions and issues raised by the summoned party will be considered on the date set forth above for hearing. Only those issues raised by motion and supported by affidavit will be considered at the time of the hearing.

IT IS FURTHER ORDERED that a true copy of this Order shall be attached to the original summons and served upon Henry Kersting, by the person serving the summons.

The United States shall notify the office of the undersigned Judge whether the summoned party has appeared and complied as ordered, or whether the hearing set by this Order will be required.

Entered this 2nd day of June, 1987, at Honolulu, Hawaii.

/s/ BERT S. TOKAIRIN
United States Magistrate

In the Matter of the Tax Liabilites of:
JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During Calendar Years 1984, 1985 and 1986;
Misc. No. _____;
Order

APPENDIX M

(Lodged June 17, 1987)

(Filed July 6, 1987)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MISC. NO. 87-0054

In the Matter of the Tax Liabilities of:

JOHN DOES, Participants in Investment Plans Promoted by Henry Kersting During the Calendar Years 1984, 1985 and 1986.

ORDER

Upon the petition for leave to serve a John Doe summons, the declaration attached thereto, and the memo-

randum of law submitted by the United States by its attorneys, and upon the Magistrate's Report and Recommendation the Court has determined: (1) that the summons relates to the investigation of an ascertainable group or class of persons, that is, taxpayers who have participated in investment plans promoted by Henry Kersting in the calendar years 1984, 1985, and 1986; (2) that there is a reasonable basis for believing that such group or class of persons may have failed to comply with various provisions of the Internal Revenue Code of 1986 (26 U.S.C.); and (3) that the information sought to be obtained from the examination of the records (and the identities of the persons with respect to whose liabilities the summons is issued) is not readily available from other sources.

IT IS THEREFORE ORDERED that the Internal Revenue Service, through an authorized officer or agent, may serve the John Doe summons, a copy of which is attached hereto as Exhibit A, upon Henry Kersting, seeking the information set forth therein.

IT IS FURTHER ORDERED that, if the summoned party has no objection to complying with the subject summons, the summoned party shall appear before Revenue Agent Larry Tahara, or any other proper official of the Internal Revenue Service, on the 24th day of August, 1987, at 3:00 P.M., at the place specified in the subject summons (or such time and place as shall be otherwise agreed to by Revenue Agent Larry Tahara or any other proper official of the Internal Revenue Service), and the summoned party shall then and there give the testimony, under oath, and produce for examination and copying documents as demanded and described in the summons.

IT IS FURTHER ORDERED that, if the summoned party objects to compliance with the subject summons, or any part of it, the summoned party shall appear before the United States District Court for the District of Hawaii in the Courtroom presided over by the undersigned Judge, on the 24th day of August, 1987, at 3:00 P.M., and show cause why the subject summons should not be enforced. In such event, the summoned party shall file and serve on the United States Attorney for the District of Hawaii and upon the Attorney General of the United States, at least (ten) 10 business days prior to the date set forth above for such hearing, written objections stating each and every ground for the failure to comply with the summons, supported by appropriate affidavits as well as any motion the summoned party desires to make. All motions and issues raised by the summoned party will be considered on the date set forth above for hearing. Only those issues raised by motion and supported by affidavits will be considered at the time of the hearing.

IT IS FURTHER ORDERED that a true copy of this Order shall be attached to the original summons and served upon Henry Kersting, by the person serving the summons.

The United States shall notify the office of the undersigned Judge whether the summoned party has appeared and complied as ordered, or whether the hearing set by this Order will be required.

Entered this 1st day of July, 1987, at Honolulu, Hawaii.

/s/ ALAN C. KAY
United States District Judge

In the Matter of the Tax Liabilities of:
JOHN DOES, etc. (Kersting);
Misc. No. 87-0054;
Order

APPENDIX N

CODE OF FEDERAL REGULATIONS

26 C.F.R.

§ 301.7610-1 Fees and costs for witnesses.

(a) *Introduction.* Section 7610 provides that the Internal Revenue Service may make payments to certain persons who are asked to give information to the Service. Under section 7610 witnesses generally will not be reimbursed for actual expenses incurred but instead will be paid in accordance with the payment rates established by regulations. Paragraph (b) of this section contains elaborations of certain terms found in section 7610 and definitions of other terms used in the regulations under section 7610(a)(b); and paragraphs (c) and (d) contain rules and rates applicable to payments under section 7610. Section 7610 and its regulations are effective for summonses issued after February 28, 1977, except as otherwise provided.

(b) *Definitions*—(1) Directly incurred costs. Directly incurred costs are costs incurred solely, immediately, and necessarily as a consequence of searching for, reproducing, or transporting records in order to comply with a summons. They do not include a proportionate allocation of fixed costs, such as overhead, equipment depreciation, etc. However, where a third party's records are stored at an independent storage facility that charges the third party a search fee to search for, reproduce, or transport particular records requested, these fees are considered to be directly incurred by the summoned third party.

(2) *Reproduction cost.* Reproduction costs are costs incurred in making copies or duplicates of summoned documents, transcripts, and other similar material.

(3) *Search costs.* Search costs include only the total-cost of personnel time directly incurred in searching for records or information and the cost of retrieving information stored by computer. Salaries of persons locating and retrieving summoned material are not includible in search costs. Also, search costs do not include salaries, fees, or similar expenditures for analysis of material or for managerial or legal advice, expertise, or research, or time spent for these activities.

(4) *Third party.* A third party is any person served with a summons, other than a person with respect to whose liability a summons is issued, or an officer, employee, agent, accountant, or attorney of that person.

(5) *Third party records.* Third party records are books, papers, records, or other data in which the person with respect to whose liability a summons is issued does not have a proprietary interest at the time the summons is served.

(6) *Transportation costs.* Transportation costs include only costs incurred to transport personnel to search for records or information requested and costs incurred solely by the need to transport the summoned material to the place of examination. These costs do not include the cost of transporting the summoned witness for appearance at the place of examination. See paragraph (c)(2) of this section for payment of travel expenses.

(c) *Conditions and rates of payments*—(1) *Basis for payment.* Payment for search, reproduction, and transportation costs will be made only to third parties served

with a summons to produce third party records or information and only for material requested by the summons. Payment will be made only for these costs that are both directly incurred and reasonably necessary. Search, reproduction, and transportation costs must be considered separately in determining whether costs are reasonably necessary. No payment will be made until the third party has satisfactorily complied with the summons and has submitted an itemized bill or invoice showing specific details concerning the costs to the Internal Revenue Service employee before whom the third party was summoned. If a third party charges any other person for any cost for which the third party is seeking payment from the Service, the amount charged to the other person must be subtracted from the amount the Internal Revenue Service must pay.

(2) *Payment rates.* The following rates are established.

(i) *Search costs.* (A) For the total amount of personnel time required to locate records or information, $8.50 per person hour for summonses issued after July 19, 1983. For summonses issued on or before such date, $5.00 per person hour.

(B) For retrieval of information stored by computer in the format in which it is normally produced, actual costs, based on computer time and necessary supplies, except that personnel time for computer search is payable only under subparagraph (2)(i)(A) of this paragraph.

(ii) *Reproduction costs.* (A) For copies of documents $.20 per page for summonses issued after July 19, 1983. For copies of documents issued on or before such date, $.10 per page.

(B) For photographers, films and other materials, actual cost, except that personnel time is payable only under subparagraph (2)(i)(A) of this paragraph.

(iii) *Transportation costs.* For transportation costs, actual cost, except that personnel time is payable only under subparagraph (2)(i)(A) of this paragraph.

(d) *Appearance fees and allowances*—(1) In general. Under section 7610(a)(1) and this paragraph, the Service shall pay a summoned person certain fees and allowances. No payments will be made until after the party summoned appears and has submitted any necessary receipts or other evidence of costs to the Service employee before whom the person was summoned. This paragraph is effective with respect to appearances made after October 26, 1978.

(2) *Attendance fees.* A summoned person shall be paid an attendance fee for each day's attendance. A summoned person shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of the attendance or at any time during the attendance. The attendance fee is the higher of $30 per day or the amount paid under 28 U.S.C. 1821(b) to witnesses in attendance at courts of the United States at the time of the summoned person's appearance.

(3) *Travel allowances.* A summoned person who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from the summoned person's residence by the shortest practical route in going to and returning from the place of attendance. Such a summoned person

shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished. A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, under 5 U.S.C. 5704, for official travel of employees of the Federal Government shall be paid to each summoned person who travels by privately owned vehicle. That rate is $.20 per mile as of April 20, 1980. Computation of mileage under this paragraph shall be made on the basis of a uniform table of distances adopted by the Administrator of General Services. Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt) shall be paid in full to a summoned person incurring those expenses.

(4) *Subsistence allowances.* A subsistence allowance shall be paid to a summoned person (other than a summoned person who is incarcerated) when an overnight stay is required at the place of attendance because the place is so far removed from the residence of the summoned person as to prohibit return thereto from day to day. A subsistence allowance for a summoned person shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, under 5 U.S.C. 5702(a), for official travel in the area of attendance by employees of the Federal Government. As of April 30, 1979, that maximum per diem allowance is $35 per day. A subsistence allowance for a summoned person attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by

the Administrator, under 5 U.S.C. 5702(c)(B), for official travel in that area by employees of the Federal Government. As of April 30, 1979, maximum rates of up to $50 per day have been prescribed by the Administrator for certain areas. An alien who has been paroled into the United States for prosecution, under section 212 (d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined under section 242(b) of that Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided for under section 7610(a)(1).

APPENDIX O

U.S. CONSTITUTION

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX P

UNITED STATES STATUTES

26 U.S.C. § 7602

§ 7602. Examination of books and witnesses

(a) Authority to summons, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense.—The purposes for which the Secretary may take any action

described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral.—

(1) Limitation of authority.—No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect.—For purposes of this subsection—

(A) In general.—A Justice Department referral is in effect with respect to any person if—

(i) The Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination.—A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately.—For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

APPENDIX Q

26 U.S.C. § 7604

§ 7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

APPENDIX R

26 U.S.C. § 7609

§ 7609. Special procedures for third-party summonses

(a) Notice.—

(1) In general.—If—

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice.—Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed,

it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined.—For purposes of this subsection, the term "third-party recordkeeper" means—

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3)); and

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof.

(4) Exceptions.—Paragraph (1) shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons.—Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash.—

(A) In general.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary.—If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc.—Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies.—

(1) In general.—Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), or 6427(j)(2) and requires the production of records.

(2) Exceptions.—A summons shall not be treated as described in this subsection if—

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of—

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony.—For purposes of this section—

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) Restriction on examination of records.—No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made—

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to

in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations.—

(1) Subsection (b) action.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons.—In the absence of the resolution of the third-party recordkeeper's response to the summons described in subsection (c), or the summoned party's response to a summons described in subsection (f), the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period—

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons.—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses.—In the case of any summons described in subsection (c), the provisions of subsections (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc.—

(1) Jurisdiction.—The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g).—The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of third-party recordkeeper and summoned party.—

(1) Recordkeeper must assemble records and be prepared to produce records.—On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give recordkeeper certificate.—The Secretary may issue a certificate to the third-party recordkeeper that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for recordkeeper who discloses.—Any third-party recordkeeper, or agent or employee thereof, making a disclosure of records pursuant to this section in good-faith reliance on the certificate of the Secretary or an order of a court requiring production of records shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons.—In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

APPENDIX S

26 U.S.C. § 7610

§ 7610. Fees and costs for witnesses

(a) In general.—The Secretary shall by regulations establish the rates and conditions under which payment may be made of—

(1) fees and mileage to persons who are summoned to appear before the Secretary, and

(2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions.—No payment may be made under paragraph (2) of subsection (a) if—

(1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records or other data required to be produced, or

(2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney of such person who, at the time the summons is served, is acting as such.

(c) Summons to which section applies.—This section applies with respect to any summons authorized under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602.

APPENDIX T

RULES OF CIVIL PROCEDURE

RULE 11

Rule 11. Signings of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule,

the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

APPENDIX U

RULE 59(b)

Rule 59. New Trials; Amendment of Judgments

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

APPENDIX V

RULE 60(b)

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of

coram nobis, coram vobis, audita querela, and bills of review, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
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Nos. 89-1774 and 89-1775

In the Supreme Court of the United States

OCTOBER TERM, 1990

HENRY F. K. KERSTING, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD HONGSERMEIER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in enforcing a summons requiring a tax shelter promoter to identify his customers for 1984-1986 and to provide other information that would assist the government in conducting audits of their income tax returns for those years.

2. Whether the district court had jurisdiction to entertain a motion to intervene in a summons enforcement proceeding after the court had ordered the summons enforced and an appeal had been taken to the court of appeals from that order.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1774

HENRY F. K. KERSTING, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-1775

RICHARD HONGSERMEIER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a)[1] is reported at 891 F.2d 1407. The order of the district court enforcing the summons (Pet. App. 35a-38a) is unreported. The order of the district court denying intervention, an evidentiary hearing, and

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[1] "Pet. App." refers to the appendix to the petition in No. 89-1774.

assessment of costs (Pet. App. 21a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1989. A petition for rehearing was denied on February 16, 1990 (Pet. App. 1a-2a). The petitions for a writ of certiorari were filed on May 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Kersting has a history of promoting tax shelters of questionable validity.[2] The Commissioner of Internal Revenue has previously disallowed deductions claimed by participants in Kersting's shelters, and there are currently more than 1300 docketed Tax Court cases involving more than 600 investors in Kersting's shelters for taxable years prior to 1982. The IRS learned the names of those 600 individuals from documents that were seized from Kersting's offices pursuant to a search warrant in January 1981. Pet. App. 5a-6a & n.4, 56a; Pet. 21.

The Internal Revenue Service (IRS) is currently conducting an investigation to learn the identities of

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[2] Those shelters purport to generate substantial interest deductions for the participants when, in fact, the transactions that supposedly create the interest payments are circular loans or check swaps between 34 related entities that merely give the appearance that funds are transferred from one to another (Pet. App. 55a-56a). In a case involving one of Kersting's investors, the Tax Court held that the deductions generated by the transactions in Kersting's shelter program were not allowable because they did not create any true indebtedness, and no interest was actually paid. *Pike* v. *Commissioner*, 78 T.C. 822 (1982).

the participants in Kersting's shelter programs during the 1984-1986 period and to obtain information that will aid in auditing their income tax returns for those years. The IRS issued a "John Doe" summons (see 26 U.S.C. 7609) to Kersting requiring the production of all customer lists identifying the participants from 1984-1986 in any tax shelter plan promoted by him, any documents relating to those participants during those years, the books and records for the 34 corporations utilized by Kersting in the shelter promotions for 1981-1986, and bank and other records for those entities for 1984-1986 (Pet. App. 5a & n.2; see *id.* at 41a-45a, 58a-59a).

Section 7609(f) of the Internal Revenue Code (26 U.S.C.) requires the IRS to obtain authorization from a federal district court before serving a John Doe summons. The government must demonstrate to the court that the summons relates to an investigation of an ascertainable class of persons, that there is a reasonable basis for believing that the persons in that class may have failed to comply with the provisions of the Internal Revenue Code, and that the information sought is not readily available from other sources. The IRS made the necessary showing to the United States District Court for the District of Hawaii, and the district court issued an order authorizing service of the summons and also directing Kersting, if he objected to compliance, to appear before the court and show cause why the summons should not be enforced (Pet. App. 63a-70a).

Kersting objected to the summons, asserting that the summons was "issued as part of [an] on-going campaign of administrative bad faith on the part of the Commissioner" (No. 88-1738 C.R. E, Objections

to Summons 2).[3] The objections were supported by an affidavit filed by Kersting in which he stated that he was "firmly convinced that the above-referenced Summons is purely a continuation of the bad-faith campaign of persecution waged against him by the Internal Revenue Service since at least December of 1980" (No. 88-1738 C.R. E, Affidavit ¶ 4), noting that his offices had been searched and that he was aware of two grand jury investigations of his activities (*id.* ¶¶ 6, 13).

Following a hearing, the district court ordered the summons enforced (Pet. App. 35a-38a). The court found that the government had made the *prima facie* showing required for enforcement by *United States* v. *Powell*, 379 U.S. 48 (1964), and that Kersting had failed to rebut that showing. Specifically, the court found that the investigation had the legitimate purpose of investigating possible tax violations by Kersting's clients; that the requested documents met the standard for relevance; that the government did not already know the identities of all of Kersting's clients; and that there was no evidence that any persons who were the subject of the summons were currently subject to a referral to the Justice Department for criminal prosecution (Pet. App. 36a-38a; see also *id.* at 7a).[4]

2. In February 1988, Kersting filed a notice of appeal and a motion for a stay pending appeal (Pet. App. 7a & n.6). Both the district court (*id.* at 30a-34a) and the court of appeals (*id.* at 26a) denied the

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[3] "C.R." refers to documents contained in the excerpts of record on appeal.

[4] The court added that, if Kersting could show that there was such a referral, he did not have to provide information regarding the persons covered by the referral (Pet. App. 38a).

request for a stay. Subsequently, on May 31, 1988, the district court orally held Kersting in contempt for failure to comply with the summons (*id.* at 8a) and warned him that he would be fined $1,000 per day if he failed to produce the records as ordered (Nos. 88-15549 and 88-15565 C.R. Y, May 31, 1988 Tr. 26; see Pet. 8). Kersting thereafter produced some of the summoned records and moved for discharge from prior orders of the district court, claiming that he had substantially complied with the summons; the government in turn claimed that Kersting had not fully complied (Pet. App. 8a). The district court refused to consider the merits of this motion, finding that it did not have jurisdiction over the matter while Kersting's appeal from the enforcement order was pending (*ibid.*). No written order holding Kersting in contempt was ever entered, and no further proceedings were held on the government's motion to have Kersting held in contempt.

3. At the May 31, 1988, hearing, petitioners in No. 89-1775—11 individuals who had invested in Kersting's programs prior to 1982 and are among those investors currently engaged in litigation in the Tax Court (see p. 2, *supra*)—moved to intervene in the summons enforcement proceeding. The district court denied the motion because a notice of appeal had already been filed from the enforcement order, explaining that "there is no longer any proceeding in which to participate" and that the "court no longer has any jurisdiction" to consider the motion (Pet. App. 24a). The court also denied for the same reason several other motions made by Kersting at that time, which pertained to discovery and the recovery of costs of complying with the summons. *Id.* at 21a-25a; see also *id.* at 8a-9a.

4. The court of appeals consolidated all of the appeals from the district court—Kersting's appeals from the enforcement order and from the district court's refusal to consider his post-appeal motions and the appeal of petitioners in No. 89-1775 from the denial of their motion to intervene. The court of appeals affirmed the order enforcing the summons (Pet. App. 11a-15a), holding that the government had made a sufficient *prima facie* case to warrant enforcement of the summons and that Kersting had failed to rebut that showing. In particular, the court concluded that the district court had not been clearly erroneous in finding that all of the summoned documents were relevant to the investigation (*id.* at 12a-14a), and it found that "[t]he summons had a legitimate purpose: to find out who had been investing in Kersting's schemes" (*id.* at 14a). The court of appeals also affirmed the district court's holding that it lacked jurisdiction to consider the investors' motion to intervene and the motions filed by Kersting after he had filed a notice of appeal from the enforcement order, finding that these matters were not collateral to the subject of the appeal (*id.* at 15a-17a).[5]

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[5] The court of appeals also noted that Kersting's appeal of the enforcement order would be moot if he had substantially complied with the order, but the court concluded that the record was inadequate for it to determine whether there had been compliance (Pet. App. 10a-11a). The court of appeals directed the district court to determine on remand whether Kersting had substantially complied and, if it determined that a live controversy remains, to consider the merits of the motions previously denied by the district court for lack of jurisdiction (*id.* at 11a, 17a).

ARGUMENT

1. Petitioners' primary contention (89-1774 Pet. 10-15; 89-1775 Pet. 9-10) is that this Court should grant certiorari to decide whether compliance with a summons moots an appeal from an order enforcing that summons. That question is not presented here. The court of appeals did state its view that compliance with a summons would moot an appeal from an enforcement order,[6] but that statement did not form the basis for its decision. Rather, the court of appeals ruled that it could not determine on the present record whether Kersting had complied with the summons, and therefore it proceeded to consider the enforcement order on the merits, ruling that it should be affirmed and the case remanded to the district court for further proceedings. Thus, the court of appeals did not find that any of the appeals in this case was moot, and it would afford no relief to any of the petitioners if this Court were to state that compliance with a summons does not moot an appeal from an enforcement order. Petitioners are simply seeking an advisory opinion on a question that is not before this Court.

2. The issue that is properly presented here by petitioner Kersting is his claim (Pet. 15-23) that the summons should not have been enforced because it was not issued in good faith. This contention is entirely factbound and was correctly rejected by both courts below. There is no reason for further review by this Court.

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[6] This statement accords with the law previously established in the Ninth Circuit and in every other circuit that has considered the question, except for the Third Circuit. See Pet. App. 10a n.8.

Petitioner Kersting's allegations do not demonstrate any impropriety by the IRS in the conduct of its investigation or the issuance of the summons. Kersting argues (Pet. 15-16, 19-22; see also 89-1775 Pet. 15-17) that the IRS acted in bad faith because the stated reason for issuing the summons was to obtain the names of Kersting's clients during the 1984-1986 period when the IRS already knew the names of more than 600 Kersting clients who were currently litigating in the Tax Court the validity of deductions claimed for investments in tax shelters promoted by Kersting prior to January 1981. There was, however, no reason to believe that the same individuals who had invested in Kersting's schemes before January 1981 comprised his investors in 1984, 1985, and 1986. As the court of appeals stated (Pet. App. 14a), Kersting's "contention is equivalent to Kersting saying that the IRS must take his word for what is in his records, which, of course, it is not required to do." [7]

Petitioner Kersting also contends (Pet. 15, 22-23) that the summons was invalid under Section 7602(c) of the Code because Kersting and, allegedly, some of his investors were subjects of a grand jury investi-

[7] Petitioner Kersting also asserts (Pet. 15, 22) that the IRS sought "to avoid the notice requirements of Section 7609(a)" of the Code. This assertion is entirely without foundation. Section 7609(a) imposes certain notice requirements upon the IRS when it issues a summons to certain specifically defined "third-party recordkeeper[s]," such as banks, attorneys, accountants, etc.; that provision clearly does not include tax shelter promoters such as Kersting. The IRS was not required to give notice to anyone before issuing a summons for Kersting's records, and there is no basis for suggesting that the use of a "John Doe" summons here was intended to avoid some notice requirement or was improper in any other way.

~~gation in 1982 and 1983. Section 7602(c) provides~~

gation in 1982 and 1983. Section 7602(c) provides that no summons shall be issued with respect to a person if a Justice Department referral, which includes a recommendation for a grand jury investigation, is in effect with respect to that person. Although Kersting himself was informed that he would not be prosecuted, and therefore he concededly was no longer subject to a referral within the meaning of Section 7602(c), he alleges that there may remain outstanding Department of Justice referrals with respect to the other unnamed investor/targets. This objection to the summons in this case is without merit. First, Section 7602(c)(3) explicitly states that for purposes of that section each taxable year "shall be treated separately." Accordingly, even if there were outstanding referrals relating to grand jury investigations for pre-1982 years, that would not defeat this summons, which was inquiring into tax liabilities for 1984-1986. Moreover, the government represented to the district court that the grand jury investigations had terminated and that there was no ongoing grand jury investigation with respect to any of the investors. See No. 88-1738 C.R. I, Aug. 24, 1987 Tr. 14-15. And, finally, the district court's enforcement order specified that Kersting was not required to produce records with respect to any investor who he could demonstrate was under grand jury investigation (Pet. App. 37a-38a).

In sum, the district court correctly held that petitioner Kersting had not made a sufficient showing to justify either an evidentiary hearing or a refusal to enforce the summons. There is no reason for this Court to review the court of appeals' affirmance of that conclusion (see Pet. App. 15a).

3. Petitioners in No. 89-1775 contend (Pet. 10-14) that the district court should have granted their motion to intervene. But petitioners' argument is de-

voted to the merits of their intervention motion, a matter that was not considered by either of the courts below. Rather, the district court rejected the intervention request because the prior filing of a notice of appeal had divested it of jurisdiction over the summons enforcement action (Pet. App. 24a), and the court of appeals affirmed on this ground (*id.* at 16a). Petitioners advance no authority or argument to suggest that this jurisdictional ruling was erroneous. Accordingly, they present no basis for disturbing the judgment below; their contentions on the merits of the intervention question are not properly presented.[8]

Similarly, there is no basis for this Court to review the merits of petitioner Kersting's various motions that were denied by the district court for lack of jurisdiction. In particular, Kersting's arguments on the merits of its motion to recover in advance the costs of complying with the summons (Pet. 25-27) were not considered by either court below and are not properly presented here.[9]

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[8] Indeed, the court of appeals directed the district court on remand to consider the merits of the intervention motion, in the event the court determines that the case is not moot (Pet. App. 17a).

[9] Petitioner Kersting's arguments for recovery of costs are, in any event, without merit. Section 7610 of the Code provides that a summoned person may be reimbursed for "reasonably necessary" costs incurred directly in searching for and reproducing the summoned data; 26 C.F.R. 301.7610-1 establishes rates of reimbursement and also provides that no payment will be made until full compliance with the summons has been accomplished and the summoned party has submitted an itemized bill to the IRS. The courts have consistently rejected the contention that an unconstitutional taking occurs when the reimbursement provided by statute fails to cover

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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completely the costs of compliance incurred by a subpoenaed or summoned party. See, *e.g.*, *United States* v. *Continental Bank & Trust Co.*, 503 F.2d 45 (10th Cir. 1974); *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129, 130 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968). And the courts have also consistently recognized that advance reimbursement is not a precondition to enforcement of a summons. See, *e.g.*, *In re Tax Liabilities of: John Does, All Unknown Employees of Boundary Waters Restaurant*, 866 F.2d 1015, 1022 (8th Cir. 1989); *United States* v. *Schmidt*, 816 F.2d 1477, 1482-1483 (10th Cir. 1987); *United States* v. *Money*, 744 F.2d 779, 780 (11th Cir. 1984). Thus, Kersting's contention that he is entitled to an award of costs in excess of that allowed by Section 7610 is, at best, premature.

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Respondents.

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REPLY BRIEF FOR PETITIONER

To The Honorable Justices Of This Honorable Court:

Petitioner, Henry F.K. Kersting ("Petitioner") files this his Reply Brief in response to the Brief in Opposition ("OPB. ____") filed herein by the United States of America and the Internal Revenue Service ("Respondent") on August 13, 1990.

STATEMENT

As noted earlier in Petitioner's Application for Writ of Certiorari ("PTN. ____"), PTN. 3-8, this case involves pervasive administrative bad faith on the part of the IRS, culminating in the issuance of a John Doe summons to Petitioner when the IRS knew the identities, and had

already obtained many records of at least 600 persons associated with Petitioner through prior civil and criminal process. *Id.* The records included those of Petitioners Richard Hongersmeier, et al. ("Intervenors"). (See Docket No. 89-1775)

As part of its ongoing campaign of harassment and bad faith, Respondent herein continues its attacks on Petitioner by attempting to smear him as a "promoter of tax shelters of questionable validity." Respondent's cite to the case of *Pike v. Commissioner,* 78 T.C. 822, is misguided, at best.[1]

Respondent next attempts to concentrate on the issues it supposedly prevailed on at the summons enforcement hearing on the John Doe summons,[2] and affirmed on

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1. *Pike* involved deductions for Sub-Chapter "S" car leasing companies which the Tax Court disallowed after it found no hope of making a profit: the car rentals were too low. The case had nothing to do with the current companies involving Petitioner, or the years at issue in this case. Here, the Government attacks what it claims are "circular payments or exchanges of checks" and further attacks the validity of the notes involved in financing the stock transactions in question, PTN. 43a-44a (Exhibit K), (all the while acting through its agents to actively impede collection suits filed by the corporations in state courts. *See, Dixon et al. v. C.I.R.,* Docket No. 9382-83. Indeed, the mere proof of circular payments or exchange of checks does not prove that a sham exists; substantial economic interest may be involved despite such check exchanges which ultimately create bona fide indebtedness and result in substantial economic exchange of consideration. *United States v. Kilpatrick,* 726 F.Supp. 789 (D.C. Colo., 1989).

2. Respondent makes two points in its brief. Respondent argues that Petitioner's primary issue is whether compliance with a John Doe summons moots an appeal from an order enforcing that summons. The Appeals Court ruled that it could not determine whether Kersting had complied, and considered the enforcement order on its merits, affirming that order. OPB. 7.

Noting, however, that the Appeals Court did not find the appeal moot, Respondent argues that "Petitioners therefore seek an advisory opinion from this court." They then comment that even "[i]f this

appeal. *Compare,* PTN. 35a-38a (App. I), *with, id.,* 3a-25a (App. B).

Respondent, however, paints with too broad a brush and in all the wrong colors. It also refuses to recognize glaring fact contradictions in the record. First, it now admits the use of the 1981 criminal search warrant to obtain the records of the 600 investors who later comprised the 1300 Tax Court cases. OPB. 2. Next, it admits the split in the Circuits, and does not dispute in any way the legal arguments raised by Petitioners. PTN.

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court were to state otherwise, namely that compliance does not moot an appeal from an enforcement order, such a finding would not provide Petitioners any relief. *Id.*

Second, Respondent asserts that the proper issue raised by Petitioner is whether the court should enforce a John Doe summons not issued in good faith. Respondent claims that this question is "[e]ntirely factbound and was correctly rejected by both courts below." So "[t]here is no reason for further review by this Court." *Id.*

In support of its position, Respondent claims that Petitioner's allegations do not demonstrate impropriety by the IRS in its investigation or the issuance of the summons. Respondent cites two reasons for Petitioner's claim of bad faith against the IRS: (1) The IRS wanted names of Kersting's clients for tax years 1984, 1985, and 1986, when the IRS knew the names of more than 600 Kersting investors involved in current Tax Court litigation for tax years 1981 and before; and (2) the John Doe summons is invalid under Section 7602(c) as Petitioner and his investors were subject to grand jury investigations in 1982 and 1983.

Respondent counters that there was no reason for the IRS to believe that the 600 investors prior to January 1981 comprised his investors in 1984, 1985, and 1986. *Id.,* at 8. Further, Respondent contends that under Section 7602(c), each taxable year receives separate treatment, therefore outstanding grand jury referrals for pre-1982 tax years would not defeat the summons for tax liabilities for 1984-1986. "Moreover, the *government* represented to the district court that the grand jury investigations had terminated and that there was no ongoing grand jury investigation with respect to any of the investors." Respondent thus argues that the lower court correctly found an insufficient showing to justify either an evidentiary hearing or a refusal to enforce the summons. No reason exists, therefore, to review this part of the appeals court's affirmance. *Id.,* at 9 (emphasis added).

10-29. It merely argues that the mootness issue is "advisory," and that the good faith issue is "factbound." *Infra,* 2 n.2.

Respondent admittedly prevailed on one aspect of administrative bad faith—the purpose of the investigation itself. Sec. 7609(f)(2) (App. R); *infra,* 8 n.1. The fact remains, however, that Respondent sought information that went to the same issues involved in the 1300 Tax Court cases, albeit for *some* different people than those already known to Respondent. Respondent even orally argued in the district court that they did not want the records for the Tax Court case parties or Petitioner. PTN. 39a-40a (App. J). But at no time did Respondent move to, nor did the district court limit the summons to exclude the 600 known investors from the reach of the John Doe summons.

Now, however, Respondent ignores its concealment and contradiction of these facts by its papers and affidavits filed in the district court in support of summons, *id.,* 42a-45a, 51a-52a, 54a-57a (App. K), the summons itself, *id.,* 58a-62a (App. K), and the orders enforcing the summons, *id.,* 63a-66a (App. L); 67a-70a (App. M). Respondent ignores the IRS's then actual knowledge of the identities of 600 investors involved in the 1300 Tax Court cases, and the possession of literally hundreds of thousands of documents responsive to the John Doe summons. This clearly reflected on the IRS's administrative good faith in bringing the summons proceeding in the first instance.

The Government's use of a John Doe summons when it knew the identities of those persons whose records were sought, and when it possessed many of the documents sought is the main issue on which Petitioner and

Intervenors appealed. Respondent admitted this knowledge to the district court; however, the district court blindly ignored this judicial admission of bad faith in its rush to compel Kersting to produce documents.

ARGUMENT

CONFLICT IN CIRCUIT COURTS OF APPEALS AND IMPORTANCE OF STATUTE

This case is ripe for Supreme Court review. Respondent admits the split in the Circuit Courts of Appeals on the interpretation of an important Federal statute, Title 26 U.S.C. Section 7609 (App. R), relating to the circumvention by the IRS of the administrative procedures intended to govern the use of John Doe summonses. This Court has yet to rule on the issues presented by this case, and its guidance is required to resolve an admittedly difficult question on the interpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

In *Gluck v. United States,* 771 F.2d 750 (3rd Cir. 1985), the Third Circuit, while noting the conflict in the Circuits, ruled that the surrendering of the documents summoned to the IRS does not end the controversy between the parties. Other Circuits have ruled that production of all documents forming the subject matter of an appeal moots the controversy between the parties. Respondent attempts to de-emphasize the Ninth Circuit's holding that compliance with the summons would moot an appeal—a holding which is in direct contravention of the opinion of the Third Circuit in *Gluck, supra.*

The Third and Seventh Circuits recognize the need for and existence of effective relief should the court find the summons to be illegal, while the First and Second Circuits

(and by implication the Ninth Circuit) require the summoned party to refuse compliance and risk the outcome of a contempt proceeding in order to obtain their day in court.

Further, contrary to Respondent's argument, Petitioner claims that the Third Circuit is correct—that substantial compliance is irrelevant to the jurisdiction of the District Court and the Court of Appeals to determine the legality of the use of a John Doe summons and the Supreme Court and the Court of Appeals have jurisdiction over this appeal.

Respondent seems to be arguing that the Supreme Court should do nothing because the Court of Appeals ordered a remand. Yet Respondent cites no authority which strips the Supreme Court of otherwise proper jurisdiction merely because some factual issues may be determined upon remand by the District Court as directed by the Court of Appeals. This case is sufficiently developed to determine this John Doe controversy. Furthermore, the determinations of the District Court on remand are irrelevant to the main issue—whether the appeal is mooted by substantial compliance. This issue will not be determined by the District Court—it has already been determined by the Ninth Circuit, contrary to the Third Circuit's decision in *Gluck*, and the District Court is bound to rule in compliance with the Ninth Circuit's adverse determination against Petitioner and Intervenors. Respondent's legal smoke is not thick enough to obscure the weakness of its position.

By ordering the remand to the District Court and directing the District Court to dismiss if there was substantial compliance, the Ninth Circuit held, in effect, that substantial compliance moots both the intervenors' mo-

tions and Kersting's motions. In other words, the Ninth Circuit had to line up with the other Circuits opposing the Third Circuit in order to give a legal instruction to the District Court which required it to dismiss on grounds of substantial compliance. Respondent is arguing that multiple appeals should be required even though the Ninth Circuit has held that it lacks jurisdiction over this case if Kersting has already substantially complied with the summons.

Respondent's argument is nonsensical. Contrary to Respondent's claim—

> "It would afford no relief to any of the Petitioners if this Court were to state that compliance with the summons does not moot any appeal from an enforcement order." OPB. 7.

If this Honorable Court holds that Kersting's compliance with the summons is irrelevant to the issue of whether or not the Government legally or constitutionally utilized John Doe summons procedure when it knows the identity of the taxpayers whose records are being sought, Petitioners may obtain complete relief. There will be no "advisory opinion" in this instance. The John Doe summons will either be upheld or stricken as constitutionally and legally void with the attendant suppression of any benefits derived therefrom by the Government.

Respondent's claim—

> "There was, however, no reason to believe that the same individuals who had invested in Kersting schemes before January, 1981, comprised the same investors in 1984, 1985 and 1986."

OPB. 8,—is completely outrageous. The IRS knew of the 600 investors, concealed this knowledge, and did nothing

to exclude these known 600 investors from actual enforcement of the summons, which raises several questions under Rule 11, F.R.C.P. (App. T)—questions which were not addressed by the Ninth Circuit in its opinion and which need addressing by this Court.

Something more should be required of the Government —i.e., following all leads and summoning or auditing individuals directly who have been "connected" with the tax shelter program in previous years before John Doe summons may be utilized in subsequent years.

VIOLATION OF INTENT BEHIND SECTION 7609

Respondent fails to mention in its arguments the clear violation of Congressional intent that the IRS not be able to utilize John Doe summons when the identities of the taxpayers are known or the records are already in its possession.

The legislative history of 26 U.S.C. § 7609(f) (App. R) makes one point indisputably clear: Congress enacted § 7609(f) to curb the potential abuse of the John Doe summons process and provide for a court to supervise the Service's use of John Doe summonses after this Court's decision in *United States v. Bisceglia,* 420 U.S. 141 (1975).[3]

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3. A John Doe summons is a direction to a third-party to surrender information concerning taxpayers *whose identity is unknown* to the IRS. *See In Re Tax Liabilities of John Does,* 671 F.2d 977, 978 (6th Cir. 1982).

The I.R.S. must seek court approval by filing an ex parte petition in federal district court. 26 U.S.C. Sec. 7609(h)(1) and (2).

> "Section 7609(f)'s criteria thus constitute a procedural safeguard which Congress created to provide extra protection to unknown target taxpayers to whom the IRS cannot give notice." *United States v. Samuels, Kramer & Co.,* 712 F.2d 1342, 1346 (9th Cir. 1983), citing *United States v. Pittsburgh Trade Exchange, Inc.,* 644 F.2d 302, 305 (3rd Cir. 1981).

Respondent next continues its attempts to impermissibly shift the burden of proof to Kersting to prove which taxpayers in his companies are under criminal investigation and, also, to prove that the Government knows the names of his investors.

RECOVERY OF COSTS

Lastly, the Respondent's arguments against Petitioner's attempts to recover his costs are entirely misguided. Petitioner has produced literally hundreds of thousands of documents in response to the summons. He is not a federally regulated and insured institution as the banks are in the cases cited by the Respondent. The keeping of these records and regurgitating them on call is not an ordinary cost of his doing business. If any Justice of this Honorable Court had to expend over $60,000 to comply with a summons and then was forced to wait for more than two years with little hope of reimbursement, would they not think that this was a taking without Due Process of Law, in violation of the Fifth Amendment? (App. O) This is Petitioner's argument.

Incongruously, Respondent blithely ignores Petitioner's arguments as to his entitlement to an evidentiary hearing and to his request to re-open the record. Petitioner believes that this is the only way that the bad faith demonstrated by the Government may be ultimately corrected herein.

Section 7609(f) provides that the IRS may serve such a summons only if it can establish in a court proceeding (1) that the summons relates to the investigation of a particular person or an ascertainable group or class; (2) that there is a reasonable basis for believing that such person or group or class of persons may fail or have failed to comply with any provision of any internal revenue law; and (3) the information sought to be obtained from the examination of records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources. App. R.

Further, Respondent ignores the conflict between the presumptions attendant upon the filing of the "good faith affidavit" in a summons case, with the duties imposed upon counsel under Rule 11, F.R.C.P. (App. T) This Court must reconcile the conflict between the duty imposed on the IRS under the two different statutes.

CERTIORARI EVEN IF MOOT

Even if this Court holds that this case would otherwise be moot, applying the "capable of repetition yet evading review" exception to the mootness doctrine recognized by this Court in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), this Court should grant review because the latter prong of the exception—that the controversy be sufficiently likely to be repeated—has been met herein in light of the history of dealings between the parties and the increasing use of the John Doe summons by the IRS.

CONCLUSION

For the foregoing reasons, the petitions should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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